San Francisco
Law Library

436 CITY HALL

No. 152573

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

N. 2763 No. 13439

United States
Court of Appeals
For the Ninth Circuit.

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Apostles on Appeal

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13439

United States
Court of Appeals
For the Ninth Circuit.

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Apostles on Appeal

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

JAMES A. QUINBY, ESQ.,
LLOYD M. TWEEDT, ESQ.,
STANLEY J. COOK, ESQ.,
DERBY, SHARP, QUINBY & TWEEDT,
1000 Merchants Exchange Building,
San Francisco 4, California,

Proctors for Appellant.

CHAUNCEY F. TRAMUTOLO, ESQ.,
United States Attorney,

KEITH R. FERGUSON, ESQ.,
Special Assistant to the Attorney General,

J. STEWART HARRISON, ESQ.,
Attorney, Department of Justice,
Post Office Building,
San Francisco, California.

Proctors for Appellee.

In the United States District Court for the Northern District of California, Southern Division

In Admiralty—No. 25871

UNITED STATES OF AMERICA,

Libelant,

vs.

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY, a Corporation,

Respondent.

LIBEL FOR COLLISION DAMAGE

To the Honorable, the Judges of the United States District Court for the Northern District of California, Southern Division:

The libel of United States of America, as owner of the SS Golden Gate, in a cause of collision, civil and maritime, respectfully alleges as follows:

I.

At all times hereinafter mentioned the libelant United States of America was and now is a corporation sovereign and the owner of the SS Golden Gate, a steamship of 6,214 gross tons (Official No. 244,413), which, up until the time of the collision hereinafter described, was tight, staunch and strong and in all respects seaworthy and properly manned, officered, equipped and supplied for the purposes intended.

II.

The respondent, Shipowners and Merchants Tugboat Company, was a corporation, duly organized under the laws of one of the States of the United States, and has a principal placed business within the territorial jurisdiction of this Honorable Court.

III.

The respondent, Shipowners and Merchants Tugboat Company, was the owner and operator of the tug Henry J. Biddle on July 12, 1945, and at all times hereinafter mentioned.

IV.

On July 12, 1945, the SS Golden Gate was towed from Moore Drydock Company Yard in Oakland to Pier 19, San Francisco, in San Francisco Harbor, by the tugs Sea Scout, Reliance, Crowley No. 24 and Henry J. Biddle. The SS Golden Gate had no power of her own and was not making use of her engines during this maneuver but was being moved as a "dead ship" by the tugs above named. During the afternoon of that day and in the course of the movement above described, the tug Henry J. Biddle collided with the SS Golden Gate, denting various plates on the port side of the latter ship and causing other serious damage.

V.

The aforesaid collision and the damages resulting therefrom were not caused or contributed to by any fault or negligence on the part of those on board the SS Golden Gate but were caused wholly by and

due solely to fault and negligence on the part of those in charge of the tug Henry J. Biddle in the following particulars, among others, which will be brought out upon the trial:

1. She was not in the charge of competent persons.
2. She was proceeding at an immoderate rate of speed under the circumstances.
3. She was not properly equipped or manned.
4. She failed to navigate with due caution required under the circumstances, thereby causing the collision and damage to the SS Golden Gate.
5. She did not take proper precautions to avoid the collision.
6. She collided with the SS Golden Gate, which she was assisting to move as a "dead ship."

VI.

By reason of the premises and as a result of the collision libelant has sustained heavy damages consisting of the cost of repairing the SS Golden Gate, the expenses of the vessel during repairs, and other substantial expenses necessarily incurred and to be incurred as a result of the collision. That immediately after said collision the said damage to the SS Golden Gate was surveyed by marine surveyors and the cost of making said collision repairs was estimated at the sum of $7,100.00, no part of which sum has been paid although payment thereof has been duly demanded.

VII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against Shipowners & Merchants Tugboat Company, and that said respondent may be required to appear and answer on oath all and singular the matters aforesaid; that libelant may have a decree for its damages with interest and costs; and that the Court will grant to libelant such other and further relief to which it may be entitled in law and justice.

/s/ CHAUNCEY F. TRAMUTOLO,
United States Attorney,
By KRF

/s/ KEITH H. FERGUSON,
Special Assistant to the
Attorney General,

/s/ J. STEWART HARRISON,
Attorney, Department of
Justice, Proctors for
Libelant.

[Endorsed]: Filed May 16, 1951.

[Title of District Court and Cause.]

ANSWER TO LIBEL

To the Honorable, the Judges of the Above-Captioned Court:

The answer of respondent, Shipowners and Merchants Tugboat Company, a Corporation, to the libel on file herein, respectfully admits, denies and alleges as follows:

I.

Answering paragraph I, denies that said vessel was in all respects seaworthy prior to the collision, and alleges, on information and belief, that the same was then not in first-class condition, but was in need of overhaul and repair.

II.

Admits the allegations of paragraph II.

III.

Admits the allegations of paragraph III.

IV.

Admits the allegations of paragraph IV, except that respondent denies that the damage to the Golden Gate in said collision consisted of anything more than a few shallow dents in her port side plating, none of which was at all serious and none of which caused her to leak or impaired her former state or required repair.

V.

Answering paragraph V, denies generally and

specifically each of the six allegations of fault therein contained, but admits that said collision was not caused by any fault on the part of the Golden Gate.

VI.

Answering paragraph VI, denies that libelant sustained any damage in excess of $250 for survey and repairs actually made; denies that any other costs or expenses were incurred by libelant or that any other repairs were necessary or were ever made, and alleges that said collision caused no diminution in the value of said Golden Gate to libelant; in this connection respondent alleges, on information and belief, that said vessel was one of a number of used surplus ships of the same class, dimensions, equipment and value, all of which ships were intended to be sold by libelant and all of which were in fact thereafter sold at a uniform price, and that said Golden Gate was eventually sold for exactly the same price as the other ships of said group, with no diminution in value or sales price from said collision or from any damage sustained by said vessel in said collision.

VII.

Admits the allegations of paragraph VII.

Further answering said libel, and as a First Special Defense thereto, respondent alleges as follows:

I.

The cause of action attempted to be asserted in said libel is barred by laches, in that said collision

occurred on July 12, 1945, and libel was not filed until May 16, 1951, the period which libelant allowed to elapse between collision and libel thus being 5 years, 10 months and 4 days.

Further answering said libel, and as a Second Special Defense thereto, respondent alleges as follows:

I.

Prior to and at the time of said collision said tug Henry J. Biddle was an American vessel, home port San Francisco, owned and operated by respondent. At all times herein concerned said tug was reasonably worth no more than $1,500.

II.

Prior to the start of the voyage on which said collision occurred, respondent had used due diligence to make said tug in all respects sound, seaworthy and properly manned, equipped and supplied, and prior to and at the time of said collision said tug was in fact sound, seaworthy, and properly manned, equipped and supplied.

III.

The collision herein concerned happened without the knowledge, fault or privity of respondent corporation or any of its officers, and any damage sustained by libelant was done, occasioned and incurred without the knowledge, fault or privity of respondent corporation or any of its officers.

IV.

Any liability on the part of respondent should be limited to the value of the tug Henry J. Biddle as provided by the United States statutes for "Limitation of Vessel Owner's Liability" (46 U.S.C.A. 183 et seq.), of which statutes respondent herewith claims the benefits and protection.

Wherefore respondent prays for judgment in its favor and for such other and further relief as may be just and proper in the premises.

Dated: June 5th, 1951.

DERBY, SHARP, QUINBY & TWEEDT,
Proctors for Respondent.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed June 12, 1951.

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED BY RESPONDENT TO LIBELANT UNDER SUPREME COURT ADMIRALTY RULE 31

1. Please describe the Golden Gate in detail as to dimensions, tonnage, engines, class, design and age.

2. Is it not true that the Golden Gate was one of several sister ships of the same design, class, dimen-

sions, tonnage and type of engine and equipment, owned by the United States in 1945?

3. Was not the Golden Gate sold subsequent to the collision?

4. If the answer to interrogatory #3 is "yes,"

a. When was she sold?

b. To whom was she sold?

c. What price was obtained for her?

5. Aside from temporary repairs in the amount of $150, is it not true that no other repairs of collision damage were made to the Golden Gate before she was sold?

6. Is it not true that, at various times before and after the sale of the Golden Gate, libelant sold other vessels of the same class, design, dimensions, tonnage, type of engines and equipment as the Golden Gate?

7. If the answer to interrogatory #6 is "yes,"

a. What were the names of such other ships?

b. When were they built?

c. When were they sold?

d. What price was obtained for each of them?

8. Is it not true that, after World War II, libelant sold a number of vessels to various buyers?

9. If the answer to interrogatory # 8 is "yes,"

a. Was not a standard price established by libelant for vessels of the Golden Gate's class, design, dimensions, etc.?

b. What was that standard price?

c. Did not the Golden Gate sell for that established price?

10. In the negotiations leading to the sale of the Golden Gate,

a. Was the subject of collision damage discussed in any way with the buyer?

b. Did the buyer request any reduction in price because of existing collision damage?

c. Was any reduction in price made or allowed because of collision damage?

11. Is it not true that the Golden Gate was sold for the same price at which she could and would have been sold had there been no collision damage?

12. If it be contended that the sales price received for the Golden Gate was in any way reduced or diminished because of damage incurred in the collision with the Henry J. Biddle, please state the details as to the amount of such reduction and the manner in which it was made.

Dated: June 4, 1951.

DERBY, SHARP, QUINBY & TWEEDT,
Proctors for Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed June 13, 1951.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES PROPOUNDED BY RESPONDENT TO LIBELANT

1. The SS Golden Gate was a C2-S-B1 type vessel, built in 1943 by Moore Dry Dock Company at Oakland, California. Her gross tonnage is 6,214.41 and net tonnage 3,508. She is 438.9 feet in length, her depth is 27.75 feet, and width 63.1 feet. She was propelled by General Motors cross-compound steam turbines transmitting power to the main line shaft through double reduction gears.

2. Yes.

3. Yes.

4. (a) September 5, 1946;
   (b) Compania Sud Americana da Vapores (Chilean Line);
   (c) $957,818.00.

5. Yes.

6. Yes.

7. (a) There were 113 ships of the exact class and design of the Golden Gate built during World War II. Exception is taken to this interrogatory on the ground that it is not relevant, and the naming of the individual ships imposes a useless burden upon the libelant.

8. Yes.

9. (a) No. The prices of the various ships are established by section 3(d) of the Ship Sales Act of 1946, (50 U.S.C.A. App. 1735-1941). The statute set a standard for determining the price to be charged, which varies within the limits of the floor price according to age, conditions and features present or lacking in the particular vessel;

(b) None, as explained in (a);

(c) See above.

10. (a) We have no knowledge of any such discussion;

(b) No;

(c) No.

11. Yes.

12. See answer to 11.

Dated August 9th, 1951.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General.

/s/ J. STEWART HARRISON,
Attorney, Department of
Justice, Proctors for
Libelant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 9, 1951.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed that the above-entitled cause be submitted to the above-entitled Court for decision upon the following Statement of Facts.

I.

On July 12, 1945, the SS Golden Gate, owned by the United States through the War Shipping Administration, was being moved as a "dead ship," from Moore Drydock Company in Oakland, California, to Pier 19 in San Francisco by the tugs Sea Scout, Reliance, Crowley No. 24, and Henry J. Biddle. After the Golden Gate had cleared the repair yard, and while she was being towed to Pier 19, the tug Henry J. Biddle struck the Golden Gate head on, damaging the SS Golden Gate.

II.

The collision was caused solely by the faults, errors and negligent navigation of the tug Henry J. Biddle, and was not contributed to in any way by any act or neglect on the part of the SS Golden Gate or any agent or employee of libelant United States of America.

III.

At the time of the collision the tug Henry J. Biddle was owned and operated by respondent Shipowners and Merchants Tugboat Company, which is legally liable for the faults of the tug. Said collision, however, occurred without the knowledge

or privity of respondent or of its directors or managing or executive officers, and respondent is therefore entitled to limit its liability, under Sections 183-189 of Title 46, U. S. Code, to the value of the tug.

IV.

At the time of the collision and at the end of the voyage on which the collision occurred, the tug was worth $1,500, and respondent is entitled to limit its liability to that amount.

V.

Subsequent to the collision, temporary repairs costing approximately $250 were made to the SS Golden Gate.

VI.

Immediately following the collision the damage thereby done to the SS Golden Gate was surveyed by competent surveyors and the cost of permanent repairs was estimated to be $5,400, which amount is fair and reasonable. Said permanent repairs, however, were never made, and, on September 5, 1946, libelant sold the vessel to the Chilean Line with said damage still unrepaired.

VII.

On March 8, 1946, approximately 8 months after the collision, a law became effective whereby Congress made provision for the disposal of War Surplus Vessels, and pursuant to the provisions of this Act (50 U.S.C.A. 1736), and Regulations duly adopted thereunder, the SS Golden Gate was sold for the minimum statutory sales price of $957,818 on September 5, 1946, to the Chilean Line.

VIII.

The SS Golden Gate was a C2-S-B1 type vessel built in 1943. Her gross tonnage was 6,214.41 and net tonnage 3508. She was 438.9 feet in length and 27.5 feet in depth and 63.1 feet in width. She was propelled by General Motors cross-compound steam turbine transmitting power to the main line shaft through double reduction gears.

IX.

The price of $957,818 was the only legal price at which a United States owned vessel of the age, class and description of the SS Golden Gate could be sold by libelant, and was the only legal price at which the SS Golden Gate could have been sold by libelant.

By reason of the aforementioned statute and regulations establishing a minimum sale price for this vessel, no reduction therefrom was sought or requested by the buyer because of the unrepaired collision damage, and no such reduction was made or allowed.

X.

The sole issue remaining in this case is the legal issue of whether or not the estimated cost of unrepaired damage is a legally recoverable item of damage to libelant. If it is, libelant is entitled to a decree of $1,500, by virtue of respondent's right to limit its liability, as above set forth. If it is not, libelant is entitled to a decree for $250.

XI.

This stipulation may be filed and made part of the record and proceedings in this case and the same is hereby submitted for decision upon the pleadings, the interrogatories and answers thereto, and this stipulation, under the applicable laws and regulations material thereto.

DERBY, SHARP, QUINBY & TWEEDT,

By /s/ STANLEY J. COOK,
Proctors for Respondent.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.
By KRF

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General.

/s/ J. STEWART HARRISON,
Attorney, Department of Justice, Proctors for Libelant.

[Endorsed]: Filed January 11, 1952.

[Title of District Court and Cause.]

MEMORANDUM OPINION

This case comes here on a stipulation of facts and arises from a collision between the tug Biddle, owned by the respondent, and the SS Golden Gate,

a Liberty-type vessel owned by the libelant, United States of America, through the Maritime Commission.

It is admitted and stipulated that the respondent's vessel was solely at fault in the collision, and it is further stipulated that the respondents are entitled to limit their liability to $1,500.00 pursuant to the provisions of the Limitation of Liability Act, Title 46, U.S.C., Sections 183-189.

The sole issue remaining in the case is the legal issue of whether or not the estimated cost of unrepaired damage is a legally recoverable item of damage to the libelant.

It appears from the stipulation of facts that this vessel remained in the unrepaired state (except for minor temporary repairs) for 18 months after the collision. At the end of this 18-month period the vessel was then sold at a price set by law for the disposal of surplus vessels by the U. S. Maritime Commission. The law set the only legal price for which this vessel could be disposed of by the United States. See 50 U.S. Code, Appendix, Sec. 1736, and C.F.R., Title 46, Chapt. 11, Supp. F, Sec. 299.56.

It is the contention of the respondent that since the United States received the full statutory price for the vessel in its unrepaired state, that no loss was suffered, and consequently the libelant is not entitled to a decree for any damages other than the cost of the minor temporary repairs.

Damages in collision cases, where the repairs are not made, can be measured either by estimated cost of repairs at a time immediately following the acci-

dent, as the libelant seeks to do here, or by the diminution in the market value of the vessel. To avoid the influence of market fluctuations and price changes, either of these methods must be accomplished as soon after the collision as is reasonably possible.

Respondent cannot escape damages by showing that the vessel was sold eighteen months after the collision for a statutory sales price; he must go further and show that this sales price fairly reflected the market value of the vessel immediately prior to the collision. The subsequent sales price eighteen months after the collision has no evidentiary significance in measuring the diminution in value of the vessel caused by the collision.

The respondent's argument, in effect, seeks to take advantage of the fact that the injured party was fortunate enough to find a purchaser for the damaged vessel who was willing to pay the full statutory price. It is a well-settled principle of law that a tort-feasor cannot escape the consequences of his wrong-doing merely because his victim was fortunate enough to receive reparation from a collateral source. See 1939 Edition of the Restatement of Torts, Section 920, Comment c. The law is so well settled on this point that further citation of authority appears unnecessary. Although it is not felt that the subsequent sale at the statutory sales price necessarily constitutes a reparation for the collision damages, in any way, the application of the principle of res inter alios acta, as above

stated, would prevail against respondent's contention.

It having been stipulated that the estimate of $5,400 as the cost of permanent repairs is fair and reasonable, and that respondent is entitled to limit liability to $1,500, the value of the tug after the collision, it is the judgment of this Court that a decree be entered in favor of the libelant, United States of America, in the sum of $1,500 without interest or costs.

Dated this 6th day of March, 1952.

/s/ MICHAEL J. ROCHE,
Chief Judge, United States
District Court.

[Endorsed]: Filed March 6, 1952.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-captioned cause having come on regularly for trial on February 27, 1952, and the libelants United States of America appearing by their proctors, Chauncey Tramutolo, United States Attorney, Keith R. Ferguson, Special Assistant to the Attorney General, J. Stewart Harrison, Attorney, Department of Justice, and the respondents appearing through their proctors, Derby, Sharp, Quinby & Tweedt, by Stanley J. Cook, and the libelants and respondents having agreed upon a stipulation of

facts on file herein, argued orally the sole remaining legal issue and it was submitted to the Court. After due consideration of all the facts so stipulated and the law relative thereto, the Court being fully advised in the premises now makes the following facts so stipulated this Court's

Findings of Fact

I.

On July 12, 1945, the SS Golden Gate, owned by the United States through the War Shipping Administration, was being moved as a "dead ship," from Moore Drydock Company in Oakland, California, to Pier 19 in San Francisco by the Tugs Sea Scout, Reliance, Crowley No. 24, and Henry J. Biddle. After the Golden Gate had cleared the repair yard, and while she was being towed to Pier 19, the Tug Henry J. Biddle struck the Golden Gate head on, damaging the SS Golden Gate.

II.

The collision was caused solely by the faults, errors and negligent navigation of the Tug Henry J. Biddle, and was not contributed to in any way by any act or neglect on the part of the SS Golden Gate or any agent or employee of libelant United States of America.

III.

At the time of the collision of the tug Henry J. Biddle was owned and operated by respondent Shipowners and Merchants Tugboat Company, which is legally liable for the faults of the tug. Said colli-

sion, however, occurred without the knowledge or privity of respondent or of its directors or managing or executive officers, and respondent is therefore entitled to limit its liability, under Sections 183-189 of Title 46, U. S. Code, to the value of the tug.

IV.

At the time of the collision and at the end of the voyage on which the collision occurred, the tug was worth $1,500, and respondent is entitled to limit its liability to that amount.

V.

Subsequent to the collision, temporary repairs costing approximately $250 were made to the SS Golden Gate.

VI.

Immediately following the collision the damage thereby done to the SS Golden Gate was surveyed by competent surveyors and the cost of permanent repairs was estimated to be $5,400, which amount is fair and reasonable. Said permanent repairs, however, were never made, and, on September 5, 1946, libelant sold the vessel to the Chilean Line with said damage still unrepaired.

VII.

On March 8, 1946, approximately 8 months after the collision, a law became effective whereby Congress made provision for the disposal of War Surplus Vessels, and pursuant to the provisions of this Act (50 U.S.C.A. 1736), and Regulations duly adopted thereunder, the SS Golden Gate was sold

for the minimum statutory sales price of $957,818 on September 5, 1946, to the Chilean Line.

VIII.

The SS Golden Gate was a C2-S-B1 type vessel built in 1943. Her gross tonnage was 6,214.41 and net tonnage 3508. She was 438.9 feet in length and 27.5 feet in depth and 63.1 feet in width. She was propelled by General Motors cross-compound steam turbine transmitting power to the main line shaft through double reduction gears.

IX.

The price of $957,818 was the only legal price at which a United States owned vessel of the age, class and description of the SS Golden Gate could be sold by libelant, and was the only legal price at which the SS Golden Gate could have been sold by libelant.

By reason of the aforementioned statute and regulations establishing a minimum sale price for this vessel, no reduction therefrom was sought or requested by the buyer because of the unrepaired collision damage, and no such reduction was made or allowed.

X.

The sole issue remaining in this case is the legal issue of whether or not the estimated cost of unrepaired damage is a legally recoverable item of damage to libelant. If it is, libelant is entitled to a decree for $1500, by virtue of respondent's right to limit its liability, as above set forth. If it is not, libelant is entitled to a decree for $250.

From the foregoing findings of fact the Court makes its

Conclusions of Law

I.

That the libelants are entitled to recover from respondent Shipowners and Merchants Tugboat Company the sum of Fifteen Hundred Dollars ($1,500.00) in damages.

II.

That the subsequent sale eighteen months after the collision at the statutory sales price does not bar recovery by the libelants because it is not indicative of the market value of the vessel immediately following the collision and has no relation to the market value of the vessel prior to the collision.

It Is Therefore Ordered that a decree be entered in favor of liblants United States of America in the sum of Fifteen Hundred Dollars ($1,500.00) without interest or costs.

Dated this 6th day of March, 1952.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Affidavit of Service by Mail attached.

Lodged March 3, 1952.

[Endorsed]: Filed March 6, 1952.

In the United States District Court for the
Northern District of California,
Southern Division
In Admiralty No. 25871

UNITED STATES OF AMERICA,
Libelant,

vs.

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY, a Corporation,
Respondent.

FINAL DECREE

The above cause having come on regularly to be heard on the pleadings and proofs and stipulations of fact and having been submitted by the advocates for the respective parties, and after due deliberation having been had and after Findings of Fact and Conclusions of Law having been duly settled and filed;

It Is Ordered, Adjudged and Decreed that the libelant take from respondent Shipowners and Merchants Tugboat Company the sum of Fifteen Hundred Dollars ($1,500.00) without interest or costs.

Dated this 6th day of March, 1952.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Lodged March 3, 1952.

[Endorsed]: Filed March 6, 1952.

[Title of District Court and Cause.]

PETITION FOR APPEAL

Shipowners and Merchants Tugboat Company, a corporation, respondent in the above-entitled cause, being aggrieved by the final decree made on March 6, 1952, and entered herein on March 7, 1952, claims an appeal from said decree and prays that the same be allowed.

Dated: San Francisco, California, May 28, 1952.

/s/ JAMES A. QUINBY,
/s/ LLOYD M. TWEEDT,
/s/ STANLEY J. COOK,
DERBY, SHARP, QUINBY & TWEEDT,
Proctors for Respondent.

[Endorsed]: Filed May 28, 1952.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND STAYING EXECUTION

Pursuant to its petition for appeal dated May 28, 1952, and presented this date to the Court,

It Is Ordered that the appeal of respondent Shipowners and Merchants Tugboat Company, a corporation, from the final decree made on March 6, 1952, and entered herein on March 7, 1952, be allowed as prayed, and that, upon the said respondent deposit-

ing $2000 in cash with the Clerk as security pending appeal, all further proceedings in execution of said decree be stayed.

Dated: May 28th, 1952.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed May 28, 1952.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

In support of its appeal herein, respondent and appellant Shipowners and Merchants Tugboat Company, a corporation, hereby assigns error in the proceedings, orders and final decision of the District Court in the above-entitled cause, as follows:

1. The District Court erred in finding and concluding that libelant's recoverable damage herein amounted to any sum in excess of the $250 spent for temporary repairs to the Golden Gate.

2. The District Court erred in failing and refusing to find and conclude that libelant's recoverable damage was limited to the $250 actually spent for temporary repairs to the Golden Gate.

3. The District Court erred in concluding that libelant could recover for unrepaired collision damage to the Golden Gate, despite her subsequent sale for the full price established by federal statute and regulation.

4. The District Court erred in concluding that libelant could recover for unrepaired collision damage to the Golden Gate despite the fact that she was later sold for exactly the same amount as she could and would have sold for had there been no collision.

5. The District Court erred in concluding that the sale of the Golden Gate after the collision had no bearing on the issue as to the amount of recoverable damage herein.

6. The District Court erred in concluding that the Act of March 8, 1946 (50 U. S. C. A., appendix, 1736) and regulations adopted thereunder had no bearing on the issue as to the amount of libelant's recoverable damages.

7. The District Court erred in concluding that libelant was entitled to recover the sum of $1500 herein.

8. The District Court erred in failing and refusing to conclude that libelant was entitled to recover $250, only.

9. The District Court erred in entering decree against respondent for $1500.

10. The District Court erred in failing and refusing to enter decree against respondent for $250, only.

Dated: May 28, 1952.

/s/ JAMES A. QUINBY,

/s/ LLOYD M. TWEEDT,

/s/ STANLEY J. COOK,

DERBY, SHARP, QUINBY & TWEEDT,

Proctors for respondent and appellant Shipowners and Merchants Tugboat Company, a corp.

[Endorsed]: Filed May 28, 1952.

[Title of District Court and Cause.]

CITATION ON APPEAL

United States of America—ss:

The President of the United States of America to libelant United States of America, appellee herein,

Greeting:

You are hereby cited and admonished to be and appear at the United States Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within forty (40) days from the date hereof, pursuant to an

order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein Shipowners and Merchants Tugboat Company, a corporation, is respondent and appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Michael J. Roche, United States District Judge for the Northern District of California, this 28th day of May, 1952.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Attest:

[Seal] C. W. CALBREATH,
Clerk.

[Endorsed]: Filed May 28, 1952.

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF RECEIPT OF PAPERS ON APPEAL

On behalf of libelant, United States of America, receipt is hereby acknowledged of copies of each of the following:

Petition for Appeal.
Order allowing appeal and staying execution.
Assignment of Errors.
Praecipe for Apostles on Appeal.
Acknowledgment of receipt of papers on appeal.

/s/ CHAUNCY TRAMUTOLO,
U. S. Atty.

/s/ KEITH R. FERGUSON,
Spec. Assist. to Atty. General.

/s/ JOHN STEWART HARRISON,
Proctors for Libelant and Appellee.

[Endorsed]: Filed May 28, 1952.

[Title of District Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL

To the Clerk of the above-entitled Court:

Respondent Shipowners and Merchants Tugboat Company, a corporation, having appealed to the United States Court of Appeals for the Ninth Cir-

cuit from the final decree heretofore made and entered herein, you are hereby requested to prepare and certify Apostles on Appeal in accordance with the rules of said Court of Appeals, and to file such Apostles with said Court of Appeals in due course, Please include therein the following:

1. Libel for collision damage.
2. Answer to libel.
3. Interrogatories propounded by respondent to libelant.
4. Answers to interrogatories propounded by respondent to libelant.
5. Stipulation of Facts.
6. Findings of Fact and Conclusions of Law.
7. Final Decree.
8. Memorandum Opinion filed March 6, 1952.
9. Petition for Appeal.
10. Order allowing appeal and staying execution.
11. Assignment of Errors.
12. Praecipe for Apostles on Appeal.
13. Acknowledgment of receipt of papers on appeal.

Dated: May 28, 1952.

/s/ JAMES A. QUINBY,
/s/ LLOYD M. TWEEDT,
/s/ STANLEY J. COOK,
DERBY, SHARP, QUINBY & TWEEDT,
Proctors for respondent-appellant.

[Endorsed]: Filed May 28, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO APOSTLES ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing documents are the originals filed in this Court in the above-entitled case, and that they constitute the apostles on appeal as designated by the Proctors for the Appellant herein, to wit:

Libel for collision damage.

Answer to libel.

Interrogatories propounded by Respondent.

Answers to interrogatories propounded by Respondent.

Stipulation of facts.

Memorandum opinion.

Findings of fact and conclusions of law.

Final decree.

Petition for appeal.

Order allowing appeal and staying execution.

Assignment of errors.

Citation on appeal.

Acknowledgment of receipt of papers on appeal.

Praecipe for apostles on appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 24th day of June, 1952.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ C. W. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13439. United States Court of Appeals for the Ninth Circuit. Shipowners and Merchants Tugboat Company, a corporation, Appellant, vs. United States of America, Appellee. Apostles on Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 24, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit.

No. 13,439

SHIPOWNERS & MERCHANTS TUGBOAT CO., a Corporation,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS RELIED UPON ON APPEAL AND DESIGNATION OF RECORD NECESSARY FOR CONSIDERATION.

Pursuant to Rule 19(6) of the Rules of the above-entitled Court, the above-named appellant herewith refers to points 1 to 10, inclusive, of its Assignment of Errors heretofore filed with the Clerk of the United States District Court for the Southern Division of the Northern District of California and certified to this Court by said Clerk as part of the record on appeal, and adopts the same as its statement of points relied upon on appeal.

Appellant further designates as necessary for the consideration of this appeal, and to be printed, the following parts of the record certified to this Court by the aforementioned Clerk of the District Court:

1. Libel for collision damage.
2. Answer to libel.

3. Interrogatories propounded by respondent to libelant.

4. Answers to interrogatories propounded by respondent to libelant.

5. Stipulation of Facts.

6. Findings of Fact and Conclusions of Law.

7. Memorandum opinion filed March 6, 1952.

8. Final decree.

9. Petition for appeal.

10. Order allowing appeal and staying execution.

11. Assignment of Errors.

12. Praecipe for Apostles on Appeal.

14. This statement of points and designation of record to be printed.

15. Citation on Appeal.

16. Clerk's Certificate.

Dated: June 25, 1952.

/s/ JAMES A. QUINBY,

/s/ LLOYD M. TWEEDT,

/s/ STANLEY J. COOK,

DERBY, SHARP, QUINBY & TWEEDT,
Proctors for Appelant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 25, 1952.

No. 13,439

United States Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

JAMES A. QUINBY,
LLOYD M. TWEEDT,
STANLEY J. COOK,
DERBY, SHARP, QUINBY & TWEEDT,
1000 Merchants Exchange Building, San Francisco 4, California,
Proctors for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 13,439

United States Court of Appeals
For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY, a corporation,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

APPELLANT'S OPENING BRIEF.

This is an appeal to the United States Court of Appeals for the Ninth Circuit from a final admiralty decree of the United States District Court for the Northern District of California, Southern Division.

JURISDICTION.

The proceeding was begun by a libel *in personam* by the United States against appellant on the admiralty side of the District Court to recover damages for a collision on San Francisco Bay between the government-owned S.S. GOLDEN GATE and appellant's tug, HENRY J. BIDDLE. From a final decree in favor of the libelant, respondent has taken this appeal.

The admiralty jurisdiction of the District Court is founded on Art. III, sec. 2, of the United States Constitution and sec. 1333(1) of Title 28, U. S. Code.

Jurisdiction of this Honorable Court of Appeals exists under the same section of the Constitution and Sections 41, 1291 and 2107 of Title 28, U. S. Code, petition for appeal and allowance thereof (Apostles, p. 27) having been duly filed within ninety days from entry of final decree in the District Court (Apostles, p. 26).

STATEMENT OF THE CASE.

The case involves a single question as to the proper measure of damages to be applied to the particular facts here concerned. The amount at stake is not large, but the legal issue presented is of considerable importance, since the Government has numerous other collision claims pending in which the same issue is involved, some of those claims being against this appellant. The case was tried on an agreed statement of facts, and there are no factual issues or conflicts of testimony to be resolved.

As shown by the record, the facts are as follows:

On July 12, 1945, in San Francisco Bay, the S.S. GOLDEN GATE, owned by the United States, was struck by appellant's tug HENRY J. BIDDLE, due to the sole fault of the latter. Appellant was thus liable in full for all legally provable damages sustained by the Government, subject to limitation of liability to the then value of the tug, $1,500. These facts were stipulated to (Apostles, p. 15) and were so found by the District Court (Apostles, p. 21).

After the collision, temporary repairs were made to the GOLDEN GATE at a cost of $250. Surveyors who examined the damage estimated the cost of permanent repairs at $5,400, which is conceded to be a reasonable figure, but the Government never caused such repairs to be made.

On September 5, 1946, pursuant to the War Surplus statute and regulations thereunder, the GOLDEN GATE was sold to the Chilean Line, with collision damage still unrepaired, for the fixed statutory price. No reduction in that price was requested or allowed because of the existing damage.

On that state of facts, the United States contended that its damages were $5,650, consisting of $250 spent for temporary repairs and $5,400 estimated (but never spent) as the cost of permanent repairs. Appellant (respondent below) contended that the Government's recoverable damage consisted solely of the $250 spent for temporary repairs, since the price eventually received for the GOLDEN GATE was a fixed price which was not reduced by reason of the unrepaired damage, and which was the same price at which the ship would have been sold had there been no damage whatever.

The District Court ruled with the United States, holding that the libelant could recover the estimated cost of repair, and that provable damages therefore came to $5,650. Decree was accordingly entered against appellant for $1,500, the full amount of the value of the offending tug (limitation having been conceded by libelant).

ISSUES INVOLVED.

Thus the sole issue here presented is the propriety of allowing recovery for the estimated cost of repairs which were never made, in view of the War Surplus legislation and the sale of the GOLDEN GATE thereunder for the full statutory price. All of the assignments of error relate to that one issue.

SPECIFICATIONS OF ERROR.

First: The District Court erred in concluding that the Act of March 8, 1946 (50 U.S.C.A., appendix, 1736) and the sale of the GOLDEN GATE thereunder had no bearing on the issue of damages. Assignments of Error numbered 5 and 6 (Apostles, p. 29).

Second: The District Court erred in finding and concluding that the libelant could recover for unrepaired collision damage to the GOLDEN GATE despite her subsequent sale for the full statutory price, the same price at which she could and would have been sold had there been no collision. Assignments of Error 1, 3, 4, 7 and 9 (Apostles, pp. 28-29).

Third: The District Court erred in failing to restrict libelant's recovery to the $250 actually expended as a result of this collision. Assignments of Error 2, 8 and 10 (Apostles, pp. 28-30).

ARGUMENT.

FIRST SPECIFICATION OF ERROR.

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE ACT OF MARCH 8, 1946 (50 U.S.C.A., APPENDIX, 1736) AND THE SALE OF THE GOLDEN GATE THEREUNDER HAD NO BEARING ON THE ISSUE OF DAMAGES.

Assignments of Error.

5. The District Court erred in concluding that the sale of the GOLDEN GATE after the collision had no bearing on the issue as to the amount of recoverable damage herein.

6. The District Court erred in concluding that the Act of March 8, 1946 (50 U.S.C.A., appendix, 1736) and regulations adopted thereunder had no bearing on the issue as to the amount of libelant's recoverable damages.

On March 8, 1946 (subsequent to the collision, but prior to sale of the GOLDEN GATE) there became effective a statute providing for sale of war surplus vessels owned by the United States.

That statute, 50 U.S.C.A. (appendix) 1736(d), provides that the sales price for surplus dry-cargo ships shall be 50% of *prewar* cost, less 5% per year for depreciation, but never to be less than 35% of *war* cost.

Subsection (c) of that same section states that "prewar cost" means an amount determined by the Maritime Commission and published in the Federal Register as the amount for which a ship could have been built at the start of 1941.

Subsection (e) provides that "war cost" means the 1944 cost, as similarly determined and published by the Commission.

The GOLDEN GATE was a "C-2" type vessel, built in 1943. (Paragraph VIII of Stipulation of Facts, Apostles, p. 17; Finding VIII, Apostles, p. 24). The prewar and war costs of C-2 vessels were determined and published by the Maritime Commission as provided in the statute, and are found in Title 46 C.F.R., Chapter II, Section 299.56 (subparagraphs (c) (4) and (5)). The figures are as follows: Prewar cost is $2,100,000; war cost is $2,736,624. *Unadjusted* statutory sales price is $1,050,000 (50% of prewar cost), and the floor, or minimum, price is $957,818 (35% of war cost).

Since the GOLDEN GATE was built in 1943 (supra) and was sold in 1946 (Finding VII, Apostles, p. 23), the statutory formula would be $1,050,000 (50% of prewar cost) less 15% (5% depreciation per year), or an "adjusted" price of $892,500. The "floor" of 35% of war cost, however, is $957,818, which thus became *the one and only price* at which the GOLDEN GATE could be sold. In fact she *was* sold for this price on September 5, 1946. (Finding VII, Apostles, p. 23).

It will be seen that, under the Act and the regulations thereunder, all C-2 vessels built in 1943 could only be sold for the fixed amount of $957,818, regardless of their condition. The GOLDEN GATE brought this full price, and would have brought no more if the collision damage had been completely repaired, *or if there had been no collision at all.*

On the basis of this sale for the full statutory price, appellant contended below, and contends here, that the United States suffered no actual damage or loss other than the $250 spent for temporary repairs. Among other contentions, the Government argued that this sale was immaterial and inapplicable here, because it was "res inter alios acta". The trial court agreed with this view in its memorandum opinion (Apostles, pp. 18-21).

We do not quite understand how the sale of the GOLDEN GATE can be thought to fall within the rule cited in the District Court's opinion. As we have always understood it, the rule of reparation from a collateral source set forth in the cited section of the Restatement of Torts (sec. 920, comment "e") relates solely to compensation received by the injured party from insurance, gifts, or contractual arrangements *previously made* (e.g., a contract of employment under which wages continue during disability).

A *sale* of the damaged property has never been thought to fall within this rule. On the contrary, *a sale is frequently used to measure recoverable damages by crediting proceeds against sound value in order to arrive at the amount of loss.* Money received on a sale of damaged property is not insurance or "reparation," or a gift from a third party. It mitigates what might otherwise be a total loss. If a sale to a third party is irrelevant, then in every case of a salvage sale of damaged goods the claimant would be entitled to keep the proceeds and sue for a total loss, since there would be no credit against sound value. Such is not the law.

In *The Marie Palmer,* 173 Fed. 569 (E.D. Pa.), a ship injured by collision was valued by appraisers as worth $8,000 before and $3,000 after the collision. Eventually she was sold for $4,100, and the court credited the sales proceeds against pre-accident value to arrive at $3,900 as the provable damages, rather than crediting only the estimate of post-collision value.

In *Hubbard v. U. S.,* 92 Ct. Cl. 381, the Government was successful in having a claim against it reduced by crediting the proceeds of sale of the wreck against the cost of raising it.

In *The Dunbritton,* 73 Fed. 352 (2nd Cir.), damage to several kinds of cargo was involved. Shipments of nux vomica and tumeric arrived with oil stains on the packages, and surveyors estimated the amount to be allowed for such damage as depreciating the value. At the trial it developed that the cargo owner had eventually sold these goods for full market price. The court held that, *by reason of the sale and receipt of full market value, the libelant had sustained no loss,* and recovery was denied.

Thus the sale of the damaged vessel in this case is not *per se* incompetent evidence, or irrelevant to the issues, and does not fall within the rule that a tort-feasor cannot claim the benefit of "remuneration from other sources." The effect of the receipt by the United States of the statutory price for the GOLDEN GATE will be argued in the next portion of this brief. At this point we contend merely that the sale was properly put into evidence and must be considered on the merits.

SECOND SPECIFICATION OF ERROR.

THE DISTRICT COURT ERRED IN FINDING AND CONCLUDING THAT THE LIBELANT COULD RECOVER FOR UNREPAIRED COLLISION DAMAGE TO THE GOLDEN GATE DESPITE HER SUBSEQUENT SALE FOR THE FULL STATUTORY PRICE, THE SAME PRICE AT WHICH SHE COULD AND WOULD HAVE BEEN SOLD HAD THERE BEEN NO COLLISION.

Assignments of Error.

1. The District Court erred in finding and concluding that libelant's recoverable damage herein amounted to any sum in excess of the $250 spent for temporary repairs to the GOLDEN GATE.

3. The District Court erred in concluding that libelant could recover for unrepaired collision damage to the GOLDEN GATE, despite her subsequent sale for the full price established by federal statute and regulation.

4. The District Court erred in concluding that libelant could recover for unrepaired collision damage to the GOLDEN GATE despite the fact that she was later sold for exactly the same amount as she could and would have sold for had there been no collision.

7. The District Court erred in concluding that libelant was entitled to recover the sum of $1500 herein.

9. The District Court erred in entering decree against respondent for $1500.

The Government's basic contention was that unrepaired collision damage can normally be recovered on the basis of estimates, and that this general rule should be applied in this case. We concede that in many cases a shipowner has been held entitled to recover for collision damage

even though repairs were not made, the estimates of competent surveyors being used to arrive at the amount to be allowed. It is our contention, however, that the rule is not an arbitrary or universal one, but applies only where, in the particular case, it furnishes the best available method of calculating the shipowner's *actual loss.*

At times, collision damages have been measured by depreciation in value before and after collision, by actual repair costs plus detention damage while laid up for repairs, or by the estimated cost of repairs needed but not performed. None of these rules is fixed or sacred. All are but means adopted to try to make the injured party whole. Each has been applied in cases where it was best adapted for that purpose, but only in those cases.

The *basic* rule is that the tort-feasor should make the injured party whole, and rests on the principle of *restitutio in integrum.*

As the Second Circuit has said in a collision case,

> "The fact that a tort has been committed only calls in play the rule of *restitutio in integrum;* so that, where injured cargo nevertheless brought the full market value, the tort feasor was not called upon to pay damages in respect thereof" (citing *The Dunbritton,* supra)—*The Winfield S. Cahill,* 258 Fed. 318, 321.
>
> "The general principle applicable where the collision is not wilful, is that the owner of the injured vessel is to be recompensed to the amount of his *actual loss;* that is, he shall receive a remuneration which places him in *the situation he would have been in, but for the collision.*" *The Rhode Island,* 20 F. Cas. No. 11,740a (S.D.N.Y.).

See, to the same effect, *The Pocahontas,* 109 F.(2d) 929 (2nd Cir.).

In the case at bar the United States, acting through Congress, elected to sell surplus C-2 vessels for $957,818. Nobody forced the Government to sell—it was the voluntary decision of the United States as a sovereign. Pursuant thereto, sound C-2 vessels were sold for that figure, and the GOLDEN GATE was likewise sold for that figure. This is the same amount for which the GOLDEN GATE could *and would* have been sold had there never been a collision with appellant's tug (Answers of the United States to respondent-appellant's interrogatory No. 11—Apostles, pp. 12 and 14).

In short, the GOLDEN GATE was voluntarily sold by the Government at a fixed price of its own selection, and brought $957,818 into the Treasury. Had appellant's tug never come within 50 miles of her, the GOLDEN GATE would have been sold for that same identical figure, and the same amount of $957,818 would have come into the Treasury. Thus the collision has not cost the Government one cent above the $250 paid out for temporary repairs, and payment of more is *not* required to place the United States in the same position it would have occupied if there had never been a collision.

That a rule for measuring damages ceases to apply when the reason for the rule does not apply has been held in many kinds of situations.

For example, in *Ill. Central Ry. v. Crail,* 281 U.S. 57, 74 L. Ed. 699, 50 S. Ct. 180, a retail coal dealer bought a carload of coal at wholesale, and it arrived with a short-

age. He bought no coal at retail to replace the missing coal, and lost no sales, but simply bought other carloads at wholesale from time to time to keep his stocks up. The lower court applied the usual rule of measuring damages by market value at time and place of delivery, and allowed the plaintiff the retail value of the lost coal.

The Supreme Court reversed this and allowed only the wholesale cost, because that was all the plaintiff lost, and he would be made whole by that allowance. The Supreme Court opinion makes these points: That the basic principle is to grant recovery in an amount sufficient to compensate for actual loss; that value at destination is the usual measure only because, in most cases, it affords a convenient and accurate way of measuring the actual loss; that this rule can and must be discarded when it is not as exact as some other, more accurate, means of measuring the loss.

In *S. P. Ry. v. Gonzalez,* 61 P.(2d) 377, 48 Ariz. 260, 106 A.L.R. 1012, tomatoes arrived damaged. Sound market value was $3.50 per box at time and place of delivery, but the plaintiff had already contracted to sell them for $2.75. Due to the damage, they were sold for $1.25 a box, and plaintiff claimed the difference between this figure and the $3.50 sound value. The Court disallowed this claim and gave the plaintiff only the difference between the $1.25 sales proceeds and the $2.75 which he would have received from his customer if the goods had arrived sound. (Incidentally, this decision also illustrates our first point that a sale to a third person is relevant on damages and is not "reparation from a third party.")

In the District Court, libelant argued that the collision brought about an immediate depreciation in the value of the ship, for which a cause of action vested, and that this cause of action could not be affected by subsequent legislation or a later sale under such legislation. We know of no rule of law which says that events after the tort cannot or should not be considered in fixing compensatory damages.

In this very case, for example, the surveyors who examined the GOLDEN GATE shortly after the collision estimated repair costs at $5,400. Had repairs been actually made six months later for an outlay of only $4,000, obviously the latter figure would be the limit of recovery, and an event occurring after the collision would reduce the recoverable damages.

In *The City of Chester,* 34 Fed. 429 (S.D.N.Y.), that exact situation existed. A vessel was injured by collision in New York harbor, and surveyors estimated what it would cost to repair the collision damage in New York. The owner later took the vessel to another port where repairs were made at a cost less than the estimates. The court limited recovery to the actual cost, saying, "Complete restitution is the extent of the damage recoverable."

Another example of subsequent events affecting the measure of damages is the issue of detention damages for loss of use during lay-up for repairs.

In *Carslogie SS Co. v. Royal Norwegian Government,* 1952 A.M.C. 652 (H. of Lords), a vessel damaged in collision made temporary repairs and sailed for another port for permanent repairs. On that voyage she sustained

heavy weather damage which necessitated a lay-up, and in fact she was under repair for some 50 days, of which ten days were attributable to collision damage. Detention damage was denied *in toto,* because the subsequent heavy weather damage had caused the vessel to cease to be a profit-making machine, and the collision, as such, caused no actual loss of profits.

In this case, once Congress ordered sale of C-2 vessels at a fixed price, the GOLDEN GATE ceased to be a profit-making vessel or to have a "market value," and became simply an asset worth the statutory price to the Government and no more. Any theoretical depreciation in "market value" became irrelevant to the question of *actual loss,* and receipt of the statutory price was all the United States could ever hope or expect to achieve.

In *The Pocahontas,* 109 F.(2d) 929 (2nd Cir.), a ship was damaged in collision. Temporary repairs were made above the water line, and the ship went to England for drydock and examination. On that trip the ship sustained heavy weather damage which required immediate drydocking and repair. While these were being made, the collision repairs were made also, and the libelant claimed detention damage for loss of use of his vessel during the repair period. The Court rejected this claim in an exhaustive discussion of the measure of damages.

The holding of that case was that *restitutio in integrum* is the basic principle, and that detention damages are allowed only when the owner can show an actual loss of use because the collision necessitated an immediate lay-up for repairs. Since the lay-up was required for

repair of heavy weather damage, detention damages were disallowed.

In that case the shipowner argued that the collision necessitated repairs, and that the subsequent heavy weather damage added nothing to the pre-existing necessity. The Second Circuit rejected this argument, because events *after* the collision may demonstrate that during the lay-up the ship would have made no earnings *even if there had been no collision.* The Court referred, by analogy, to wrongful death cases where the surviving dependent's damage is measured by life expectancy, but is reduced if he dies before trial.

Thus, in *Sider v. General Electric,* 238 N.Y. 64, 143 N.E. 792, the widow of a man killed by the defendant's negligence sued for his wrongful death, but died, herself, before trial. The trial court held that her cause of action survived her death, but limited recovery to the damage sustained by her until her death, rather than estimating it on life expectancies. The plaintiff appealed, arguing that the widow's cause of action vested as a fixed property right when her husband was wrongfully killed, and that subsequent events could not affect or diminish that right. The New York Court of Appeals rejected this contention, holding that the cause of action is only to recover actual damage, and that the widow's death fixed the period for which she had been deprived of her husband's support.

Cooper v. Shore Elec. Co., 63 N.J.L. 558, 44 Atl. 633, is a similar holding on the same kind of facts, and is cited and followed in the *Sider* case.

These New York and New Jersey decisions are cited with approval in *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 81 L. Ed. 685, 57 S. Ct. 452. There the mother of a seaman filed suit under the Jones Act for his wrongful death and died, herself, before trial. The Supreme Court held that her cause of action survived, but cited the *Cooper* and *Sider* cases, saying:

> "We think that the mother's death does not abate the suit, but that the administrator may continue it, for the recovery of her loss up to the moment of her death, though not for anything thereafter * * *" (300 U.S. at p. 347, 81 L. Ed. at p. 688.)

In all of those cases a cause of action vested to recover loss of support for the survivor's life expectancy, but subsequent events operated to reduce the amount of damage, since they made the amount capable of more accurate measurement.

Another example of subsequent events eliminating damages otherwise recoverable will be found in *King v. Bangs,* 120 Mass. 514. A mortgagee sued a trespasser for removing fixtures from the mortgaged property. In Massachusetts, as in most states, the mortgagee can recover for such damage to his security, his damages being the value of the things removed. On a showing that the mortgagee had later sold the property under a power of sale in the mortgage for an amount sufficient to satisfy the full debt, the court held that the mortgagee had sustained no actual loss and denied recovery. After pointing out that damages should be commensurate with the injury, the court said:

> "But under this rule *the defendant is constantly permitted to give in evidence the plaintiff's subsequent change of relationship to the property, for the purpose of showing that the damages to which he would otherwise have been entitled have been thereby diminished.*" (120 Mass. at p. 515.)

That a mortgagee who eventually receives full payment of the debt has suffered no actual loss by reason of damage to the mortgaged premises is similarly held in *Sloss-Sheffield v. Wilkes,* 231 Ala. 511, 165 So. 764, 109 A.L.R. 385.

In *The Super-X,* 15 F. Supp. 294 (S.D.N.Y.), a tank barge was damaged in collision and surveyors estimated costs at $850 for gas-freeing and $110 for repair work. There was no need for immediate repairs until leaks from other causes later developed, whereupon the barge was drydocked and gas-freed, and both collision and owner's repairs were made. The Commissioner allowed only the actual cost of working on the collision damage, and disallowed detention damage, towing to drydock, and the cost of gas-freeing.

This was upheld by Judge Patterson, who noted the libelant's reliance on the rule allowing recovery measured by estimates, and held that this rule is not inflexible, saying:

> "The libelant relies on the line of cases allowing as collision damage the estimated cost of repairs where no repairs are actually made or where only temporary repairs are made. *The Elmer A. Keeler,* 194 F. 339 (C.C.A.2); *Pennsylvania R. Co. v. Downer,* 11 F.(2nd) 466 (C.C.A.2) It is claimed that if the

collision damages had never been repaired, the libelant could have recovered the estimated cost of towing and gas freeing as well as estimated detention. But I take it that the rule of estimated cost of repairs in cases where no repairs are actually made is not an inflexible one. Cf. *Brooklyn Eastern Dist. Terminal v. United States,* 287 U.S. 170, 53 S. Ct. 103, 77 L. Ed. 240. What is allowed in cases of no repairs is the depreciation in value. In many instances the measure of depreciation is what it would have cost to make the repairs, on the theory that a prospective purchaser of the vessel would presumably calculate his price by deducting what he would have to spend in the future to repair the vessel. So we have the general rule relied on by the libelant as an analogy. In a case where the collision injuries were as light as here, however, the imaginary reasonable purchaser would not be presumed to subtract incidentals like estimated towage and gas freeing or estimated detention. He would count on working in the repair at some future time when the vessel was being repaired for other and more pressing damage or defect, thus avoiding double loss for the incidental items. The libelant's argument for the 'no repair' cases, while plausible, cannot be accepted." (15 F. Supp. at p. 296.)

In the case at bar there is no need to guess at the possible or probable reaction of a prospective buyer. We know that, in fact, the buyer neither requested nor obtained any reduction in price because of the unrepaired damage, but paid the full price asked by the United States, the same price which would have been received if there had never been a collision at all.

We freely concede that the collision in this case caused a possible diminution in the "market value" of the GOLDEN GATE. If suit had been filed and tried before passage of the Surplus statute, the estimated cost of repairs could perhaps have been used as being, *at that time*, the best available method of measuring that loss in value.

With the passage of the statute, however, the situation was radically changed. We do not contend that the statute fixed "market value" at the disposal price, although in one sense the statute did have that effect (since no buyer would pay more as long as he could get a C-2 ship from the Maritime Commission for $957,818). We do contend that the statute *displaced* market value, which then ceased to be relevant or material as a measure of *actual loss.*

After the passage of the statute on March 8, 1946, all C-2 vessels belonging to the United States had a set price, and that price *was all that the Government expected or intended to receive.* Since that full price was actually received into the treasury, the United States suffered no loss by reason of the collision, and is not entitled to make an extra profit on this vessel over and above what was received for *undamaged* C-2 cargo ships.

In summary, it is our contention that there is no special virtue in any particular standard that has been used in past cases to measure collision damages. The basic rule is that the injured party is entitled only to be made whole, not to make a profit. That method of calculating damages should be used which most fairly and accurately makes

good the actual loss—i.e., *which puts the injured shipowner in the same position as if there had been no collision.*

In many cases the actual repair cost will make the injured party whole, perhaps adding detention damages when justified by the facts. In others, depreciation in value is a better test. Where it is clear that a loss *has* been sustained, and that the shipowner is actually *worse off because of the collision,* estimated repair cost has been used to measure his loss when repairs had not yet been made. In our case, however, the libelant showed no actual loss. On the contrary, the facts show that, aside from the $250 spent for temporary repairs, the Government is *not* worse off, financially, because of this collision.

As a matter of ordinary fairness, we submit that there can be no recovery of estimated repair costs when the United States voluntarily sold a number of vessels for a set price and received that same price for the GOLDEN GATE, *exactly as if there had been no collision at all.*

THIRD SPECIFICATION OF ERROR.

THE DISTRICT COURT ERRED IN FAILING TO RESTRICT LIBELANT'S RECOVERY TO THE $250 ACTUALLY EXPENDED AS A RESULT OF THIS COLLISION.

Assignments of Error.

2. The District Court erred in failing and refusing to find and conclude that libelant's recoverable damage was limited to the $250 actually spent for temporary repairs to the GOLDEN GATE.

8. The District Court erred in failing and refusing to conclude that libelant was entitled to recover $250, only.

10. The District Court erred in failing and refusing to enter decree against respondent for $250, only.

The $250 spent by the United States for temporary repairs to the GOLDEN GATE is an out-of-pocket loss caused by the collision, and is properly allowable herein. With the phantom repair cost eliminated, the $250 expenditure is the *only* allowable item, and a recovery of that amount will make the Government whole by putting it in the same position as if there had never been a collision.

That the decree of the District Court should be modified by reduction to the admitted sum of $250 is

Respectfully submitted,

JAMES A. QUINBY,
LLOYD M. TWEEDT,
STANLEY J. COOK,
DERBY, SHARP, QUINBY & TWEEDT,
Proctors for Appellant.

Dated, San Francisco, California,
September 3, 1952.

No. 13,439

IN THE

United States Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY (a corporation),
Respondent-Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant-Appellee.

BRIEF FOR THE UNITED STATES, APPELLEE.

CHAUNCEY TRAMUTOLO,
United States Attorney,
KEITH R. FERGUSON,
Special Assistant to the Attorney General,
J. STEWART HARRISON,
Attorney, Department of Justice,
Post Office Building, San Francisco 1, California,
Proctors for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Table of Authorities Cited by Appellant and Referred to Herein

No. 13,439

IN THE

United States Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY (a corporation),
Respondent-Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant-Appellee.

BRIEF FOR THE UNITED STATES, APPELLEE.

This is in reply to appellant's opening brief in an appeal to the United States Court of Appeals for the Ninth Circuit from a final admiralty decree of the United States District Court for the Northern District of California, Southern Division.

JURISDICTION.

The proceeding was begun by a libel *in personam* by the United States against appellant on the admiralty side of the District Court to recover damages

for a collision on San Francisco Bay between the Government-owned SS GOLDEN GATE and appellant's tug, HENRY J. BIDDLE. From a final decree in favor of the libelant, respondent has taken this appeal.

The admiralty jurisdiction of the District Court is founded on Art. III, sec. 2, of the United States Constitution and sec. 1333(1) of Title 28, U. S. Code.

Jurisdiction of this Honorable Court of Appeals exists under the same section of the Constitution and Sections 41, 1291 and 2107 of Title 28, U. S. Code, petition for appeal and allowance thereof (Apostles, p. 27) having been duly filed within ninety days from entry of final decree in the District Court (Apostles, p. 26.)

STATEMENT OF THE CASE.

The case is a simple collision case wherein the United States seeks to recover the estimated cost of repairs to the Government-owned vessel SS GOLDEN GATE arising out of the admitted negligence of the respondent's vessel, tug HENRY J. BIDDLE. The facts are set out in great detail in appellant's opening brief. More generally they are as follows:

The case was tried on a stipulation of facts wherein respondent-appellant admitted sole liability for damages arising out of the collision, limiting its liability, however, to the value of the offending vessel at the time of the collision. The right to limitation was con-

ceded by the Government. It was stipulated by the parties that the estimated cost of repairs of $5,400 was reasonable and that the owners of the offending tug are entitled to limit liability to $1,500, being the reasonable value of the tug at the time of the collision.

The respondent-appellant admits liability for $250 expended by the Government for temporary repairs, but denies liability for the remainder of the estimated cost of permanent repairs up to the limit of $1,500.

The sole issue, then, is the often-decided one of what is the proper measure of damages in a collision case where the owner of the damaged vessel chooses not to repair. It is conceded by the appellant that an owner of a damaged vessel need not repair, and that as a general rule of law is entitled to recover from the party responsible for the collision the reasonable estimated cost of making such repairs. (Appellant's brief, pages 9 and 10.) The appellant seeks to escape liability on the ground that the damaged vessel was subsequently sold in the unrepaired state in accordance with the provisions of the War Surplus Sales Act (50 U.S.C.A. [Appendix] 1736) and provisions thereunder (46 C.F.R. 299.56) for the only amount for which the vessel could have legally been sold.

The District Court ruled that "damages in collision cases, when repairs are not made, can be measured either by estimated cost of repairs at a time immediately following the accident, as libelant seeks to do here, or by the diminution in market value of the

vessel. To avoid the influence of market fluctuation and price changes, either of these methods must be accomplished as soon after the collision as is reasonably possible." (Apostles, pages 19-20.)

SUMMARY OF ARGUMENT.

The appellee's argument can be reduced to the following points:

1. There is no reason in this case to deviate from the established rules of law for measuring collision damages.

2. The sale at the statutory sale price has no evidentiary significance in determining the damage to the vessel by reason of the collision.

3. A tort-feasor cannot escape the consequences of his wrongdoing merely because his victim is fortunate enough to receive reparation from a collateral source.

ARGUMENT.

A. THERE IS NO REASON IN THIS CASE TO DEVIATE FROM THE ESTABLISHED RULES OF LAW FOR MEASURING COLLISION DAMAGES.

It is the established rule in collision cases that the injured party is entitled to recover the difference between the *market* value of the vessel in her damaged condition and her value before the collision. As the Court said in *La Champagne,* 53 Fed. 398 at page 399 (D.C. S.D. N.Y. 1892):

> "There are two methods of arriving at the difference: Proof of the schooner's *market* value before and after the collision respectively, and the other, by proof of the cost of repairs and of putting her in as good a condition as before." (Emphasis supplied.)

See, also:

The Rhode Island, 20 F. Cas. No. 11,740a;
The Pocahontas, 109 F. (2d) 929;
The Super-X, 15 F. Supp. 294;
Pan-American Petroleum Trans. Co. v. U. S., 27 F. (2d) 685.

The Government has chosen the second method for the very simple reason that there is no available evidence as to the vessel's market value after the collision.

The argument presented by the appellant, if accepted, would introduce an entirely new and unworkable theory for measuring damage. The appellant suggests that the measure of damage in a collision case should be based upon the ultimate financial outcome to the owner of the damaged vessel and not upon the depreciation in value of the vessel or upon the cost of her repairs at the time of the collision. A simple example will show that this is an improper method. An owner could be operating a vessel at an economic loss. By reason of a collision he is forced to sell the vessel and thereby incurs a financial saving. The tort-feasor certainly cannot be allowed to come in and set off this saving against the damages

done the vessel. The ultimate financial outcome to the owner cannot be the test. Too many extraneous factors enter into such a measure. The only true tests are the value of the vessel prior to the collision as compared to her value immediately after the collision, or the cost of repairing the damage, estimated or actual.

B. THE SUBSEQUENT SALE AT THE STATUTORY SALE PRICE HAS NO EVIDENTIARY SIGNIFICANCE IN DETERMINING THE DAMAGE TO THE VESSEL BY REASON OF THE COLLISION.

The only two ways of measuring collision damages that are recognized by the Courts are:

1. Actual or estimated cost of repairs.
2. Diminution in market value immediately following the collision.

The fact of a subsequent sale eighteen months later, to be relevant, must go to one of these two methods.

Obviously it does not pertain to actual or estimated cost of repairs, nor does it pertain to diminution in market value immediately following the collision.

The statute under which this vessel was sold was not even in existence at the time of the collision, and the sale itself did not take place until fourteen months after the collision. (Stipulation of Facts VII, Apostles, pages 23-24.)

It is basic law that the damages are to be estimated at the time of the collision.

The Nantasket, 290 Fed. 813 (D.C. D.Mass. 1923).

It is incumbent upon the appellant to show that the vessel was not of less value after the collision than prior to the collision. The appellant does not discharge that burden by simply showing a sale fourteen months later at a statutory sale price; he must go further and show that the sale price fairly reflected the value of the vessel in its undamaged state on July 12, 1945.

The case of *The Nantasket,* 290 Fed. 813, supra, is a case similar to this, arising out of the sale of a submarine chaser at the end of World War I. In that case an old submarine chaser was damaged by collision while being used as a ferry. She was subsequently sold for a lump sum along with other vessels. There was no evidence as to her value before and after the accident, but there were estimates of the cost of repairs. The Court said, at page 4:

> "It seems to me a fair inference in view of the lack of evidence to the contrary, which could easily have been produced, that the No. 125 (the vessel) was worth before the accident the average price at which similar vessels sold, and that after the accident she was worth that price, less the cost of putting her into her previous condition; i.e., less the cost of repairs. * * * I am of the opinion on the facts stated that a prima-facie case is made out entitling the Government, as owner of the vessel, to damages in the amount which it would have cost to repair her immediately after the accident."

The appellant contends that the District Court erred in finding that the subsequent sale at the statu-

tory sale price had no bearing on the issue of damages, and in support of this contention cites numerous cases supporting the statement that *"a sale is frequently used to measure recoverable damages by crediting proceeds against sound value in order to arrive at the amount of loss."* (Quotation from Appellant's Opening Brief, page 7, emphasis theirs.)

The very words used by the appellant show that the sale at the statutory price has no significance. There is no evidence as to the sound value of the vessel prior to the collision, so there is nothing against which the statutory sale price can be credited or compared.

The provisions of the Act establishing the minimum sales price of these vessels made it illegal to sell this vessel at a price lower than $957,818. (Stipulation of Facts IX, Apostles p. 17; Findings of Fact IX, Apostles p. 24.)

Appellant makes much of the fact that the purchasers did not request nor did they receive a reduction in price by reason of the collision damage. The only thing that this proves is that the Maritime Administration and the purchaser complied with the law. It would have been illegal to sell the vessel at any reduction in price.

In concluding this point, it is repeated that if the subsequent sale is to have any evidentiary significance, it must be shown that it has some bearing upon the comparison between market value before and after the collision. It obviously has no bearing on *market*

value. It was the only legal price at which it could be sold and consequently we have no idea what the market price for such a vessel was, or would have been. Secondly, it was not a sale immediately following the collision. For example, let us suppose a vessel was worth $5,000 in sound state and was damaged so that repairs would cost $1,000. The market price after the collision is $4,000. But let us assume that eighteen months passes and the market rises to $6,000. This rise, or drop, as the case may be, would not be significant as to the diminution in value caused by the collision. It is equally obvious that a statutory sale eighteen months after a collision has no bearing on the measure of damages to which the appellant seeks to apply it. In collision cases, the value of the vessel in its sound as well as its damaged state must be established at the date of the collision.

C. A TORT-FEASOR CANNOT ESCAPE THE CONSEQUENCES OF HIS WRONGDOING MERELY BECAUSE HIS VICTIM IS FORTUNATE ENOUGH TO RECEIVE REPARATION FROM A COLLATERAL SOURCE.

It is submitted that the holding of the District Court has been erroneously interpreted by the appellant with regard to this point. The appellant in its brief argues that the sale of the vessel does not constitute reparation from a third party, and thereby impliedly argues that the District Court held that it did. The District Court held:

> "Although it is not felt that the subsequent sale at the statutory sales price necessarily con-

> stituted a reparation for the collision damages, in any way, the application of *res inter alios acta,* as above stated, would prevail against respondent's contention." (Memorandum Opinion, Apostles, p. 20.)

Thus it is clear that the District Court *did not hold* that the sale at the statutory price constituted reparation from a third party as appellant's brief seems to assume.

It was not the sale that was the act of a third party, *but the third party's willingness to accept the vessel, repair it at its own expense, and make no charge to the Government.*

It is exactly the same as if the Government had had the vessel repaired in a private shipyard, and for some reason known only to the owners of the shipyard, the invoices were marked paid and no actual collection ever made from the Government. In such a situation the law is clear, and as pointed out by the District Court, citation of authority would appear unnecessary; however, for amplification, the section of the Restatement of Torts cited by the District Court in its Memorandum Opinion (Apostles p. 20) is quoted as follows:

> "* * * The plaintiff is not barred from recovery merely because he suffers no net loss from the injury, as where he is insured or where friends make contributions to him because of the loss. If his things are tortiously destroyed, the insurance carrier is subrogated to his position. In other cases the damages which he is entitled to recover

> are not diminished by the fact that, either as a matter of a contract right or because of gifts, the transaction results in no loss to him. Where a person has been disabled and hence cannot work but derives an income during the period of disability from a contract of insurance or from a contract of employment which requires payment during such period, his income is not the result of earnings but of previous contractual arrangements made for his own benefit, not the tort-feasor's. Likewise, the damages for loss of earnings are not diminished by the fact that his employer or a third person makes gifts to him even though these have been given because of his incapacity. Further, he may be able to recover for the reasonable value of medical treatment or other services made necessary by the injury although these have been donated to him."
>
> *Restatement of Torts,* 1939 Edition, Section 920, Comment c.

The case here is similar in some respects to the case of *Agwilines, Inc. v. Eagle Oil & Shipping Co.,* 153 F. (2d) 869, wherein the question was one of detention loss arising out of collision. The damaged vessel was at the time of the collision chartered by the United States, and under the terms of the charter the United States was required to pay one-half charter hire during the detention period. The owner of the damaged vessel sought to recover full detention loss from the tort-feasor on the ground that payment of one-half charter hire was *res inter alios acta.* The Court agreed that the payment was in effect *res inter alios acta,* but refused to apply the rule because it

was felt that the libelant had suffered no primary loss. The Court held that the libelant had given up the use of the vessel by virtue of the charter, and therefore could not recover for the loss of use, but could only recover that which the collision deprived him of under the contract.

The dissenting opinion written by Judge Clark states as follows:

> "I take it as agreed that but for the payment by the United States to the libelant of a portion of the charter hire, pursuant to the charter, libelant would recover complete compensation for the loss of use of its vessel due to claimant's act—computed here at the charter rate, since that was the only evidence of value offered. That being so, we have the rather startling result that claimant receives the bonanza of a substantial reduction in damages through the mere chance that its victim has a favorable contract with another. * * *"
>
> * * * * * * *
>
> "For in admiralty, as well as at law, there is no more solidly established principle than that payments or reparations of whatever nature which the injured party receives from a collateral source are, in the words of the courts, res inter alios acta, of no concern to the wrongdoer."

The problem is very well analyzed by Judge Clark, and for the convenience of the Court the decision is quoted at length below.*

---

*"'I take it as agreed that but for the payment by the United States to the libelant of a portion of the charter hire, pursuant to the charter, libelant would recover complete compensation for the loss of use of its vessel due to claimant's act—computed here

It can be seen in the cited case that the Court in the majority decision refused recovery because they felt the libelant had suffered no primary loss during the period of detention. In the present case the primary loss is admitted by appellant, for in his brief

---

at the charter rate, since that was the only evidence of value offered. That being so, we have the rather startling result that claimant receives the bonanza of a substantial reduction in damages through the mere chance that its victim has a favorable contract with another. * * *''

* * * * * * *

''For in admiralty, as well as at law, there is no more solidly established principle than that payments or reparations of whatever nature which the injured party receives from a collateral source are, in the words of the courts, res inter alios acta, of no concern to the wrongdoer. (Restatement, Torts, 1939, §920, comment e; Sutherland on damages, 4th Ed., Berryman, 1916, §158, p. 487, and cases cited p. 488, n. 42, id. § 1295, p. 5014; Hale, Law of Damages, 1912, §§43-45, p. 186. This has been held true of compensation from an insurance company, The Steamboat Potomac v. Cannon, 105 U.S. 630, 26 L.Ed. 1194; The Propeller Monticello v. Mollison, 17 How. 152, 58 U.S. 152, 15 L.Ed. 68; Phoenix Ins. Co. v. The Steamboat Atlas, 93 U.S. 302, 23 L.Ed. 863; Mobile & Montgomery R. Co. v. Jurey, 111 U.S. 584, 4 S.Ct. 566, 28 L.Ed. 527, of payments under the Railroad Retirement Act, 45 U.S.C.A. §228a et seq.; McCarthy v. Palmer, D.C.E.D. N.Y., 29 F.Supp. 585, affirmed 2 Cir., 113 F.2d 721, certiorari denied Palmer v. McCarthy, 311 U.S. 680, 61 S.Ct. 50, 85 L.Ed. 438, or a state compensation act, N.L.R.B. v. Marshall Field & Co., 7 Cir., 129 F.2d 169, 144 A.L.R. 394, affirmed Marshall Field & Co. v. N.R.L.B., 318 U.S. 253, 63 S.Ct. 585, 87 L.Ed. 744; Sprinkle v. Davis, 4 Cir., 111 F.2d 925, 128 A.L.R. 1101, and of hospital and medical expenses received from a state industrial commission, Overland Const. Co. v. Sydnor, 6 Cir., 70 F.2d 338.)

''Nor is the rule confined to reparations which may be classified as insurance or indemnity where the injured party or someone acting in his behalf has contributed to the fund from which payment is made. Thus an owner may recover damages for injury to his buildings, although the terms of his lease require the tenant to continue payments. S.H. Kress Co. v. Bullock Shoe Co., 5 Cir., 56 F.2d 713. In nearly all jurisdictions, an employee may recover full damages for personal injuries, although he has received wages from his employer during the period of illness, Shea v. Rettie, 287 Mass. 454, 192 N.E. 44, 95 A.L.R. 571; Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374, 53 A.L.R. 771; Hayes v. Morris &

it is stated, "We freely concede that the collision in this case caused a possible diminution in the 'market value' of the GOLDEN GATE. If suit had been filed and tried before passage of the Surplus statute, the estimated cost of repairs could perhaps have been

---

Co., 98 Conn. 603, 119 A. 901—a view which I understand my brethren to accept in citing this line of cases favorably. And an injured party may include as part of his damages medical services, although they have been gratuitously performed or paid for by relatives. Chicago, Duluth & Georgian Bay Transit Co. v. Moore, 6 Cir., 259 F. 490, certiorari denied 251 U.S. 553, 40 S.Ct. 118, 64 L.Ed. 411. See annotation 128 A.L.R. 687.

"These decisions are so identical with the facts here that the attempt to distinguish this case as one where the libelant suffered no 'loss,' I can regard only as question begging—so much so in fact that I confess to surprise that so purely verbal an argument is urged. It is most starkly stated by claimant when it says the cases are 'clearly distinguishable' because 'in all of them plaintiff sustained the primary loss and thereafter received reimbursement by way of insurance or gratuity.' Here, just as surely, plaintiff sustained the *primary* loss (whatever significance that adjective may be thought to bring to the issue) and was definitely in the red until the loss was made good by the payments from the United States. And here the wrongdoer receives the windfall advantage which those cases deny him. Indeed, the cases which most emphatically announce the rule of 'actual loss' apply it at the same time and with entire consistency with the principle here contended for. See especially The Steamboat Potomac v. Cannon and Phoenix Ins. Co. v. The Steamboat Atlas, both cited supra. And see further the line of cases permitting recovery by a shipowner for loss of earnings, notwithstanding the availability of spare boats. The Cayuga, C.C.E.D.N.Y., Fed.Cas. No. 2,537, affirmed 14 Wall. 270, 81 U.S. 270, 20 L.Ed. 828; The Favorita, C.C.E.D.N.Y., Fed.Cas. No. 4,695, affirmed 18 Wall. 598, 85 U.S. 598, 21 L.Ed. 856; The Emma Kate Ross, 3 Cir., 50 F. 845. Indeed, we followed this principle in Pool Shipping Co. v. United States, 2 Cir. 33 F.2d 275, a case of persuasive authority here. For there we rejected the tort-feasor's argument that the libelant hull-owner's damages should be reduced by the amount of the general average contribution he had collected from cargo.

"I do not think these persuasive precedents of the law of damages should be repudiated for an unorthodox doctrine which can serve only to penalize the prudent and provident shipowner. I would reverse for the grant of damages for the loss of use, as claimed."

used as being, *at that time,* the best available method of measuring that loss in value." (Appellant's Opening Brief, page 19.)

It seems abundantly clear, in view of this admission, that the fact that the Government secured a purchaser for the vessel which was willing to absorb the price of repairs was, as respects the appellant-tort-feasor, *res inter alios acta.*

APPELLANT'S CASES DISTINGUISHED.

As previously stated, the appellant has presented the argument that the sale of the vessel was not a reparation from a collateral source, apparently in the belief that the District Court held that it was. As pointed out herein, it is the Government's position that the District Court did not hold that the sale itself constituted reparation from a collateral source, and that the fact that the Government found a buyer who was willing to absorb the cost of repairs was the *res inter alios acta.*

Appellant cites numerous cases in support of the argument that "a sale is frequently used to measure recoverable damages by crediting proceeds against sound value in order to arrive at the amount of the loss". (Appellant's Opening Brief p. 7.) In each of the cases appellant cites, there was evidence of sound value against which the sale price could be compared. In this case there is no evidence of sound value prior to the collision against which the statutory price can

be compared. Consequently, the cases cited by appellant are not in point.

The appellant cites *The Marie Palmer,* 173 Fed. 569 (E.D.Pa.) (Appellant's Opening Brief p. 8). In that case the sound value of the vessel was $8,000. After the collision she was sold for $4,100. The Court awarded $3,900 as the damages for diminution in value as a result of the collision. In that case there was available the estimated sound value before the collision and the actual market value after the collision. In the present case we have neither. Admittedly a subsequent sale immediately following a collision at a market price has bearing on the issue of damages when the sound value prior to the collision is available. A sale at a statutory price fourteen months after the collision has no bearing.

The case of *Hubbard v. U. S.,* 92 Ct. Cl. 381 (Appellant's Opening Brief p. 8), wherein the amount of damages was determined by crediting the net proceeds of a sale of a wreck against the cost of raising it can be disposed of as being inapplicable by the same reasoning as above.

The libelant cites *The Dunbritton,* 73 Fed. 352 (2nd Cir.) (Appellant's Opening Brief pp. 8-10), which involved damage to cargo of nux vomica and tumeric which received oil stains in the packaging. The damage was estimated to be $3,600 but in fact it was sold for the full market price. No recovery for damage was allowed. This case is distinguishable for once again there is a comparison between sound value be-

fore damage and market price after damage, which there is not in the present case. In the cited case it was shown there was no diminution in value. In the present case the diminution in value is admitted.

The case of *The Winfield S. Cahill,* 258 Fed. 318, cited by appellant (Appellant's Opening Brief p. 10), is another case where a sale after alleged damage brought the full market price. Once again it necessarily implies a comparison between sound value before alleged damage and market price immediately thereafter. Neither of these two factors is available for comparison one against the other, in the instant case.

The appellant quotes from *The Rhode Island,* 20 Fed. Cas. No. 11,740a (S.D.N.Y.), on page 10 of appellant's brief. This case involved the question of loss due to detention of the vessel, not loss due to diminution in value. Opinion from which appellant quotes, goes on to say, immediately following the appellant's quoted portion:

> * * * "Although there may be difficulty in defining precisely the particulars composing such actual loss, it clearly includes more than the mere damage to the vessel herself." * * *
>
> "Then, again, as to the measure of the direct injury, the party demanding damages may ascertain them by the judgment and valuation of witnesses, and recover on such valuation without waiting to repair, or attempting to repair his vessel; or he may await the completion of proper

> repairs, and then claim the expenditures reasonably laid out in her reparation." * * *
>
> "To these rules neither party raises any specific objection. The point of controversy is, whether the owner is also entitled to a recompense for being deprived of the use of his vessel for the time she is necessarily detained in receiving repairs." * * *

From the above it can be seen that the question decided by the Court has no bearing here, but in the course of the decision, the Court clearly states the two accepted methods for determining damages to the vessel in collision cases.

The Pocahontas, 109 F. (2d) 929 (2nd Cir.), cited by appellant (Appellant's Opening Brief pp. 11-14), was also a case involving damages for loss of use of the vessel during the detention period. The question was one of whether or not the loss of use was a proximate result of the collision. There is no causation question in the present case. However, in the course of the decision this Court in discussing the physical damage, reiterated what has been said here regarding hull damage where at page 931 it is stated:

> "Strictly, the measure of damages is the difference in value of the ship, before and after the collision, but the cost of necessary repairs and loss of earnings, while they are being made have long been regarded as its equivalent." Citing *Pan American-Pet. Trans. Co. v. U. S.,* 27 Fed. (2d) 685.

In support of the argument that the well established rules of measuring damages in collision cases need not apply here, appellant cites two cases involving the measure of damages under the law of contracts.

The *Ill. Central Ry. v. Crail,* 281 U.S. 57 (cited in Appellant's Opening Brief p. 11), involved the failure to deliver coal to a retail dealer, and the question was whether or not under the facts the retail dealer was entitled to the resale price of the undelivered coal or the wholesale price. The decision was made entirely upon interpretation of the Cummins Amendment to the Uniform Sales Act and has little bearing on the measure of damages in a tort case. The Government did not operate the GOLDEN GATE for the purposes of a sale, and it is pointed out by counsel in the report of the decision in the cited case, that they were trying to arrive at damages for shortage of goods intended for resale, not goods intended for retention.

The second case, *S. P. Ry. v. Gonzalez,* 61 P. (2d) 377, 48 Ariz. 260 (Appellant's Opening Brief p. 12), is also a contract case involving a subsequent sale at a contract price below market value. Tomatoes arrived damaged. Sound market was $3.50 per box, but the consignee had already contracted to sell for $2.75. Because of damage they sold at $1.25. The Court compared the sale price to the contract price to determine damages. This does not appear to be any variation in the normal rules of damages as

applied to torts interfering with contracts of sale, and does not illustrate a deviation from the established rules of measuring damages.

The appellant states, at page 13 of the appellant's opening brief, "In the District Court, libelant argued that the collision brought about an immediate depreciation in the value of the ship, for which an action vested, and that the cause of action could not be affected by subsequent legislation or a later sale under such legislation. We know of no rule which says that events after the tort cannot or should not be considered in fixing compensatory damages."

The remainder of the cases cited by appellant are cited to show that subsequent events can be considered to determine compensatory damages.

The Government did not argue in the District Court that subsequent events *per se* cannot affect the cause of action, but it was argued that the subsequent event must have some evidentiary significance to the issue. *The legislation and subsequent sale of this vessel under the legislation is a subsequent event which is without evidentiary significance in determining the diminution in value immediately following the collision.*

In *The City of Chester,* 34 Fed. 429 (S.D.N.Y.), cited by appellant (Opening Brief p. 13), the estimated cost of repairs was higher than the actual cost when subsequently made. Of course, the actual cost of repairs has evidentiary significance on damages

and was correctly the proper basis of determining recovery. We, of course, concede that when actual repairs are made the actual cost is the proper measure of damages, but it is conceded by appellant that when repairs are not made the reasonable estimated cost is recoverable.

The cases of *Carslogie SS Co. v. Royal Norwegian Government,* 1952 A.M.C. 652 (H. of Lords), and *The Pocahontas,* 109 F. (2d) 929 (2nd Cir.), cited by appellant (Appellant's Opening Brief pp. 13-14), both involve damages for detention. The subsequent events had a direct effect on the actual loss of use of the vessel. The legislation and subsequent sale for a statutory price cannot have any direct effect upon the diminution in value of the vessel immediately following the collision.

The appellant cites *Sider v. Gen. Elec. Co.,* 238 N.Y. 64, 143 N.E. 792, and *Cooper v. Shore Elec. Co.,* 63 N.J.L. 558, 44 Atl. 633, and *Van Beeck v. Sabine Towing Co.,* 300 U.S. 342, 81 L. Ed. 685, 57 S. Ct. 452 (Appellant's Opening Brief p. 15). All of these cases involve an action for wrongful death wherein the beneficiary of the cause of action died prior to the trial. The Courts limited damages to the estate of the deceased plaintiff to the actual pecuniary loss occasioned by the wrongful death which accrued during the lifetime of the plaintiff, instead of allowing an amount estimated on the life expectancy of the plaintiff. This case would be analogous to a situation where cost of repairs to a vessel were estimated to be $10,000 but prior to the trial, the actual repairs were

made and found to cost only $5,000. The cited cases would seem to have no bearing on an unrepaired damage case, nor do they show any way of making the subsequent sale of a vessel at a statutory sale price evidentially significant to the issue of diminution in value by reason of the collision.

The appellant cites also *Kings v. Bangs,* 120 Mass. 514 (Appellant's Opening Brief p. 16), regarding the mortgagee's right to recover against a tort-feasor damaging the security property. In this regard appellant also cites *Sloss-Sheffield v. Wilkes,* 231 Ala. 511, 165 So. 764, 109 A.L.R. 385 (Appellant's Opening Brief p. 17). These cases hold that a mortgagee could not recover against a tort-feasor for damage to the security property when the property in fact subsequently sold for enough to pay the mortgage debt. It is submitted that in the present case the Government is in a position more analogous to that of a mortgag*or* whose property is damaged, and when the property is subsequently sold the mortgag*or* obtains enough to pay off the mortgage debt. It certainly cannot be said that this could affect his rights against the tort-feasor for damage to his property.

Lastly, the appellant cites *The Super-X,* 15 F. Supp. 294 (S.D.N.Y.) (Appellant's Opening Brief p. 17). This is another case involving damages arising from detention of the vessel. In this case a tank barge was damaged and it was estimated that the repair work would cost $110 and gas-freeing and towing $850. The collision damage did not necessitate the immediate gas-freeing and towing nor lay-up for

repairs; however, subsequent leaks developed that did necessitate these expenditures. The Court did not allow detention or the cost of gas-freeing and towing because they found the libelant could not have reasonably incurred these charges as a result of the collision, but must reasonably await some time when it was necessary to drydock the vessel, regardless of the collision. In other words, the extra expenses were not a proximate result of the collision. The Court in this case repeats the rule regarding physical damage to the vessel as quoted in appellant's brief at page 18, wherein it is stated, "What is allowed in cases of no repair is the depreciation in value." The remainder of appellant's quotation applies solely to whether or not a prospective purchaser would be justified in demanding a reduction in price to compensate him for estimated detention and towing and gas-freeing, and since the owner could not have recovered these items under the facts, then neither would a prospective purchaser have been entitled to such a reduction, so there was no diminution in market price in the amount of these items. The diminution in the value of the vessel as a result of the collision is admitted in the present case. Appellant's argument that since the prospective purchaser did not receive a reduction in price, the owner cannot recover for the damage, attempts to apply a converse of the cited case, which is not true in the present case, for it is admitted herein that the Government could have recovered the estimated cost of repairs had the suit been brought prior to the sale. In the cited case it is

held that as to the items in dispute the owner could not have recovered.

The appellant's closing argument is nothing more than a repetition of the time-worn argument used in cases where the injured party has received reparation from a collateral source, and the tort-feasor argues that the injured party should not be doubly compensated. The courts have consistently refused to honor this contention.

As was pointed out by Judge Clark in the quoted opinion in *Aqwilines, Inc. v. Eagle Oil & Shipping Co.* (supra) that if such an argument were accepted,

> "we have the rather startling result that the claimant (tort-feasor) receives the bonanza of a substantial reduction in damages through the mere chance that its victim has a favorable contract with another."

CONCLUSION.

For the foregoing reasons it is felt that the District Court was correct in ruling that the only acceptable methods of determining damage in a collision case is by determining the diminution in the market value resulting therefrom, and that the estimated cost of repairs is the only evidence available in this case upon which to make that determination. The subsequent sale of the vessel fourteen months after the collision under the provisions of a statute passed eight months after the collision, for the only legal price at which the vessel could be sold has no evidentiary

significance on the diminution of market value of the vessel. The fact that the Government found a corporate purchaser for the vessel that was willing to absorb the cost of repairs to itself is *res inter alios acta,* and cannot be a fact used by the tort-feasor in seeking to escape the consequence of its admitted negligence.

That the judgment herein should be affirmed is

Respectfully submitted,

CHAUNCEY TRAMUTOLO,
United States Attorney,
KEITH R. FERGUSON,
Special Assistant to the Attorney General,
J. STEWART HARRISON,
Attorney, Department of Justice,
Proctors for Appellee.

Dated, San Francisco, California,
October 15, 1952.

No. 13,439

IN THE

United States Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S CLOSING BRIEF.

JAMES A. QUINBY,
LLOYD M. TWEEDT,
STANLEY J. COOK,
DERBY, SHARP, QUINBY & TWEEDT,
1000 Merchants Exchange Building, San Francisco 4, California,
Proctors for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

I.

THIS CASE DOES NOT INVOLVE THE DOCTRINES OF "RES INTER ALIOS ACTA" OR "REPARATION FROM A COLLATERAL SOURCE".

Appellee continues to argue that the sale of the GOLDEN GATE was "res inter alios acta," and quotes the Restatement of Torts on reparation from a collateral source. In support of that argument, appellee then quotes and relies upon a *dissenting* opinion in a case whose *decision* was directly in favor of appellant here.

The quoted text of the Restatement and the cases cited in Judge Clark's dissenting opinion in *Aguiline v. Eagle Oil Co.*, 153 F.(2nd) 869 (pp. 10 to 14 of appellee's brief) show that the rule on "reparation from a collateral source" relates solely to two basic situations:

1. Where because of insurance or other contract made by the injured party *before* the tort, the injured party receives compensation, he may nevertheless recover.

2. *Gifts* to the injured party *after* the loss do not reduce or mitigate the liability of the tort-feasor.

Neither situation exists in this case. The sales proceeds of the GOLDEN GATE were *not* received by virtue of an insurance policy or a contract of some sort made before the collision. They were received as the result of two events happening *after* the accident. One was the voluntary act of the appellee in its sovereign capacity, in setting a fixed sale price for all C-2 vessels. Incidentally, this price was not merely a floor or minimum, but was the *only* price at which a C-2 could be sold.

The other event was the sale, under that statute, to the Chilean Line, which paid the statutory price. Appellee seems to argue that the "willingness" of the buyer to pay the full price and repair at its own expense was a sort of "gift" from the Chilean Line to the United States, within the meaning of the rule on reparation from collateral sources. Nothing could be farther from the truth. The price voluntarily established by the Government was set low enough to enable these surplus vessels to be sold readily, and was enough of a bargain that the buyer was satisfied to pay the statutory price for the GOLDEN GATE. There was no "gift" to the United States in any sense of the word.

There is no magic in the phrase "reparation from a collateral source." It does *not* automatically eliminate from consideration everything done between the injured party and third persons after the tort. It does not repeal or modify the rule that the injured party must do what he can to mitigate the damages. In doing so, he must deal with third persons, and his acts in that regard are relevant and material to the quantum of damages. For example, if he is having his property repaired, he must get the lowest price he can. If he is selling the damaged property, he must get the highest price reasonably available.

If a shipowner received repair offers of $5,000 from A, $3,000 from B, and $2,500 from C, all reputable firms agreeing to do the same identical work, he must take the lowest bid, and cannot hold the tort-feasor for more than $2,500. Appellee apparently would argue that C's willingness to do the work cheaper than A or B was a "gift" from C, and that $5,000 should be recovered. Merely to state the contention is to reveal its absurdity.

Nobody paid insurance to the Government here, or continued payments under a pre-collision contract, or made a gift to the United States. The appellee voluntarily set a single bargain price for all C-2 vessels, and then sold this damaged vessel for the full statutory price. We do not understand why the eyes of the law must be closed to this transaction, merely because it involved a third party, and appellee has not made out a case by reference to a rule which is designed for an entirely different situation.

II.

THE AUTHORITIES SUPPORT APPELLANT'S POSITION.

We cited cases in our opening brief to establish two basic ideas:

1. That events occurring *after* a tort may bear materially on the quantum of recoverable damages and may reduce or eliminate the amount which would otherwise have been recoverable.

2. That there is no one fixed, arbitrary yardstick for measuring damages in all cases. That particular method should be used which, under the circumstances, most nearly arrives at the ultimate goal of measuring damages so as to make the injured party whole—no more and no less.

Appellee's attempted distinction of the cases cited in our opening brief does not contest the propriety or validity of those two basic rules, but points out that none of our citations involved the particular set of facts and issues here presented. We cheerfully concede that the

exact issue now before this Court is one of first impression. We have never contended that there was a decision in the books "on all fours" with this case.

The basic principles laid down in the cited cases, however, must be applied here, with *restitutio in integrum* as the ultimate goal. Those cases, therefore, are in point to the extent that they hold:

1. The injured party should be made whole from actual loss sustained, but *is not entitled to make a profit.*

2. There is no particular sanctity or vested right in any one *method* of measuring the actual loss. That method is to be used which most fairly and accurately measures *the actual loss* and makes the injured party whole.

3. Events occurring after the tort which liquidate or fix the amount of actual loss are relevant and material. The *cause of action* vests at the time of the tort, but the *quantum* of recoverable damage is measured at time of trial *in the light of the situation then existing.*

4. A sale of the damaged article after the tort is not reparation from a collateral source, but is a transaction which helps to fix the actual pecuniary loss of the owner.

The only cases cited by appellee are *The Nantasket,* 290 Fed. 813, and the dissenting opinion in the *Aguiline* case, 153 F.(2nd) 869 (supra).

In *The Nantasket,* the damaged vessel was not sold alone, but as part of a group of several vessels, there being a lump sum for the entire group. Such a sale of course shed no light on the diminution of the damaged ship's value, and was properly disregarded. Here, how-

ever, the damaged vessel was sold by itself, and the Government admits that it was sold for the exact price at which it *would* and *could* have been sold had there been no damage at all.

Interrogatory No. 11 (Apostles, p. 12) reads:

> "Is it not true that the GOLDEN GATE was sold for the same price at which she could and *would* have been sold had there been no collision damage?"

The Government's answer was "Yes" (Apostles, p. 13).

Paragraph IX of the Stipulation of Facts (Apostles, p. 17) and of the Findings (Apostles, p. 24) recites that the price received for the GOLDEN GATE was "the *only* legal price at which the SS GOLDEN GATE could have been sold by libelant."

In the *Aguiline* case, 153 F.(2nd) 869 (2nd Cir.), (cert. den. 328 U.S. 825, 90 L. Ed. 1611, 66 S. Ct. 980), the shipowner had the vessel under charter and the charter-party required the charterer to pay half-hire while the vessel was laid up for repairs. In a suit for collision damage, the owner claimed full charter-hire for loss of use, arguing that his receipt of half-hire was reparation from a collateral source which should be disregarded. Judge Clark's dissenting opinion agreed with the libelant. The *majority* opinion, however, held that half-hire was all the libelant *actually lost,* and so was all that he could recover.

In the *Aguiline* case the contract between libelant and a third party operated to reduce the libelant's actual loss, and was given the legal effect of reducing the quantum of recoverable damage accordingly. In our case the contract

between libelant and the Chilean Line brought into the treasury the same number of dollars for the GOLDEN GATE that would have been received had there never been a collision, thus showing that libelant-appellee sustained no actual loss of any kind. Under the *holding* of the *Aguiline* case in the majority opinion, the sale of the GOLDEN GATE prevents libelant from recovering anything more than the $250 spent for temporary repairs.

Dated, San Francisco, California,
October 24, 1952.

Respectfully submitted,
JAMES A. QUINBY,
LLOYD M. TWEEDT,
STANLEY J. COOK,
DERBY, SHARP, QUINBY & TWEEDT,
Proctors for Appellant.

No. 13440

United States
Court of Appeals
for the Ninth Circuit.

CALIFORNIA BY-PRODUCTS CORPORATION, E. F. HAVEN, ARMAND J. PIHLBLAD and SONNET SUPPLY CO.,

Appellants,

vs.

FRANK M. CHICHESTER, Trustee in Bankruptcy of the Estate of Superior Casting Company, Inc., Bankrupt; BILL LEPPER MOTORS, INC., and CONSOLIDATED CASTING CO.,

Appellees.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-15-52

No. 13440

United States
Court of Appeals
for the Ninth Circuit.

CALIFORNIA BY-PRODUCTS CORPORATION, E. F. HAVEN, ARMAND J. PIHLBLAD and SONNET SUPPLY CO.,

Appellants,

vs.

FRANK M. CHICHESTER, Trustee in Bankruptcy of the Estate of Superior Casting Company, Inc., Bankrupt; BILL LEPPER MOTORS, INC., and CONSOLIDATED CASTING CO.,

Appellees.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-15-52

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

INDEX PAGE

INDEX PAGE

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

DANIEL W. GAGE,
RUSSELL B. SEYMOUR,
1120 Rowan Bldg.,
458 S. Spring St.,
Los Angeles 13, Calif.

For Appellee Frank M. Chichester, Trustee, etc.:

ERLICH & BLONDER,
608 S. Hill St.,
Los Angeles 14, Calif.

For Appellee Bill Lepper Motors, Inc.:

ROBERT H. SHUTAN,
333 S. Beverly Dr.,
Beverly Hills, Calif.

For Appellee Consolidated Casting Co.:

JAMES T. BYRNE,
214 Rowan Bldg.,
Los Angeles 13, Calif.

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy—No. 51460

In the Matter of
SUPERIOR CASTING COMPANY, INC.,
a California Corporation,

Alleged Bankrupt.

CREDITORS' PETITION

To the Honorable the Judges of the District Court of the United States, in and for the Southern District of California, Central Division:

The petition of the undersigned creditors of the above named Superior Casting Company, Inc., a California corporation, sometimes hereinafter known as the alleged bankrupt, respectfully shows:

I.

That at all times herein mentioned the said alleged bankrupt has been and now is a California corporation with its residence, domicile and principal place of business in this District at 1601 East El Segundo Boulevard, El Segundo, California, Los Angeles County; that it has had its residence, domicile and principal place of business as aforesaid for all of the six months next immediately preceding the filing of this petition. [2*]

*Page numbering appearing at foot of page of original Certified Transcript of Record.

II.

That said alleged bankrupt at all times mentioned has been engaged in mercantile and commercial pursuits, to wit: casting business, and is not, nor has it ever been, a banking, railroad, insurance or municipal corporation, or a building and loan association or a farmer or engaged in the tillage of the soil.

III.

That said alleged bankrupt owes debts in excess of the sum of $1000.00.

IV.

That at all times herein mentioned said alleged bankrupt has been and now is insolvent in that the reasonable value of all of its assets is less than the indebtedness owing by said alleged bankrupt.

V.

That the claims of the petitioners, and each of them, are liquidated as to amount and fixed as to liability, and none of the petitioners has any security for any of the claims herein asserted.

VI.

That the claims of the petitioners are each for goods, wares, and merchandise sold and delivered and labor performed within two years last past to the alleged bankrupt at its special instance and request, of the reasonable value of the amount set forth opposite the signature of each petitioner, no part of which has been paid, and all of which is now due, owing and unpaid.

VII.

That the alleged bankrupt within four months immediately preceding the filing of this petition committed an act of bankruptcy in that it paid to The Pacific Telephone & Telegraph Co., who was then and there an unsecured creditor of the alleged bankrupt and of the same class as the petitioners, the sum of $164.77 with intent to [3] prefer said creditor and did prefer said creditor over and above other creditors of the same class including the petitioners; and for a second and further act of bankruptcy petitioners allege that within four months next immediately preceding the filing of this petition the alleged bankrupt paid to one or more unsecured creditors, whose true names are now unknown to the petitioners, certain moneys the exact amount of which is not now known to the petitioners, with intent to prefer and did prefer said creditors and each of them over and above other creditors of the same class, including the petitioners; and for a third and further act of bankruptcy, petitioners allege that during the month of November, 1950, the alleged bankrupt transferred or permitted to be transferred substantially all of its assets consisting generally of land, buildings and equipment, located at 1601 East El Segundo Boulevard, El Segundo, California, of the reasonable value of $95,000.00 to Lepper Motors, Inc., in consideration of an asserted claim approximating $60,000.00 with the intent to hinder or delay the creditors of said alleged bankrupt.

Wherefore, petitioners pray that said alleged

bankrupt be adjudged a bankrupt within the meaning and purview of the Bankruptcy Act, and for such other and further relief as may be proper.

ARMAND J. PIHLBLAD,

/s/ ARMAND J. PIHLBLAD,

With an unsecured claim in the amount of about $2,550.00.

SONNET SUPPLY COMPANY,

By MERLE HILLIARD,
Secretary-Treasurer,

/s/ MERLE HILLIARD,

With an unsecured claim in the amount of about $273.65.

E. F. HAVEN, d.b.a. E. F. HAVEN & ASSOCIATES,

By E. F. HAVEN,

/s/ E. F. HAVEN,

With an unsecured claim in the amount of about $496.21.

/s/ RUSSELL B. SEYMOUR,
Attorney for Pet. Creditors.

Duly verified.

[Endorsed]: Filed February 19, 1951. [4]

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 19th day of February, 1951;

Whereas, a petition was filed in this court on the 19th day of February, 1951, against Superior Casting Company, Inc., a California Corporation, alleged bankrupt above named, praying that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to Reuben G. Hunt, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Superior Casting Company, Inc., a California Corporation, shall henceforth attend before said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

W. M. BYRNE,
District Judge.

[Endorsed]: Filed February 19, 1951. [6]

[Title of District Court and Cause.]

ADJUDICATION OF BANKRUPTCY AND ORDER TO FILE SCHEDULES

At Los Angeles, California, in said District, on the 13th day of April, 1951.

The petition of Armand J. Pihlblad, Sonnet Supply Co., and E. F. Haven, doing business as E. F. Haven & Associates, filed on the 19th day of February, 1951, that Superior Casting Company, Inc., a California corporation, be adjudged a bankrupt under the Act of Congress relating to bankruptcy, the answer thereto filed by the above-named bankrupt, the request for admission of facts under Rule 36 of the Federal Rules of Civil Procedure, the purported answer thereto filed by the alleged bankrupt, and the motion and notice of motion for summary judgment under Rule 56 of Federal Rules of Civil Procedure, all having been considered by the Court at the hearing had on April 12, 1951, after notice, and it appearing therefrom that the allegations contained in said creditors' petition are true, and no appearance having been made by or for the said [7] alleged bankrupt, now, therefore,

It Is Adjudged that the said Superior Casting Company, Inc., a California corporation, is a bankrupt under the Act of Congress relating to bankruptcy.

It Is Further Ordered that said Superior Casting Company, Inc., a California corporation, bankrupt herein, prepare and file herein within five days from the date hereof Schedules and Statement of Affairs

in triplicate, pursuant to Section 7 of the Bankruptcy Act.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

Affidavit of service by mail attached.

[Endorsed]: Filed April 13, 1951, Referee.

[Endorsed]: Filed April 13, 1951, U.S.D.C. [8]

[Title of District Court and Cause.]

BOND OF FRANK M. CHICHESTER

Know All Men By These Presents:

That we, Frank M. Chichester, of 846 Rowan Building, Los Angeles 14, California, as Principal, and the Fidelity and Deposit Company of Maryland, a corporation duly incorporated under the laws of the State of Maryland, and authorized to act as Surety under the act of Congress approved August 13, 1894, whose principal office is located in Baltimore, State of Maryland, as Surety, are held and firmly bound unto the United States of America in the sum of One Thousand and No/100 Dollars ($1,000.00), in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Signed and sealed this 14th day of June, A.D. 1951. The Condition of this Obligation is such,

that, Whereas, the above-named Frank M. Chichester was, on the 14th day of June, A.D. 1951, appointed trustee in the case pending in bankruptcy in the said Court, wherein Superior Casting Co., Inc., is the Bankrupt, and he, the said Frank M. Chichester as trustee, has accepted said trust with all the duties and obligations pertaining thereto.

Now, Therefore, if the said Frank M. Chichester, as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of the said Bankrupt which shall come into his hands and possession and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed in the presence of:

/s/ FRANK M. CHICHESTER,

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By /s/ S. M. SMITH,
Attorney-in-Fact.

/s/ OTTO A. GERTH.

Examined and recommended for approval as provided in Rule 8.

Approved this 15th day of June, A.D. 1951.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

State of California,
County of Los Angeles—ss.

On this 14th day of June, 1951, before me, Theresa Fitzgibbons, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared S. M. Smith, known to me to be the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that he subscribed the name of the Fidelity and Deposit Company of Maryland thereto and his own name as Attorney-in-Fact.

[Seal] /s/ THERESA FITZGIBBONS,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires May 3, 1954.

[Endorsed]: Filed June 15, 1951, Referee.

[Endorsed]: Filed June 21, 1951, U.S.D.C. [10]

[Title of District Court and Cause.]

ADDITIONAL BOND OF FRANK M. CHICHESTER

Know All Men By These Presents:

That we, Frank M. Chichester of Los Angeles, California, as Principal, and the Fidelity and Deposit Company of Maryland, a corporation duly

incorporated under the laws of the State of Maryland, and authorized to act as Surety under the act of Congress approved August 13, 1894, whose principal office is located in Baltimore, State of Maryland, as Surety, are held and firmly bound unto the United States of America in the sum of Ninety-nine Thousand and No/100 Dollars ($99,000.00), in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Signed and sealed this 2nd day of January, A.D. 1952.

The Condition of this Obligation is such, that, Whereas, the above-named Frank M. Chichester was, on the 14th day of June, A.D. 1951, appointed trustee in the case pending in bankruptcy in the said Court, wherein Superior Casting Co., Inc., is the Bankrupt, and he, the said Frank M. Chichester, has accepted said trust with all the duties and obligations pertaining thereto; and Whereas, by a further order of the Court dated January 2, 1952, the said Frank M. Chichester is required to file an additional bond in the sum above named.

Now, Therefore, if the said Frank M. Chichester, as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of the said Bankrupt which shall come into his hands and possession and shall in all respects faithfully perform all his official duties

as said trustee, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed in the presence of:

/s/ FRANK M. CHICHESTER,

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By /s/ V. L. N. PARKER,
Attorney-in-Fact.

/s/ GEORGE GARDNER,
Attorney-at-Law.

Examined and recommended for approval as provided in Rule 8.

Approved this 2nd day of January, A.D. 1952.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

State of California,
County of Los Angeles—ss.

On this 2nd day of January, 1952, before me, S. M. Smith, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared V. L. N. Parker, known to me to be the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that he subscribed the name of the Fidelity and Deposit

Company of Maryland thereto and his own names as Attorney-in-Fact.

[Seal] /s/ S. M. SMITH,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires February 18, 1954.

[Endorsed]: Filed January 2, 1952, Referee.

[Endorsed]: Filed January 4, 1952, U.S.D.C. [11]

[Title of District Court and Cause.]

CERTIFICATE OF REFEREE ON REVIEW OF ORDER GRANTING PETITION TO COMPROMISE CONTROVERSY

To the Honorable William M. Byrne, Judge of the above-entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of the above-entitled Court, do hereby file, at the request of Reuben G. Hunt, a Referee in Bankruptcy of said Court, his certificate on the review of his order entered in the above-entitled matter on November 15, 1951, granting the petition of the trustee in bankruptcy for the compromise of a controversy under Section 27 of the Bankruptcy Act. The said certificate is in the form as prepared and drafted by Referee Hunt. [12]

EHRLICH & BLONDER,
Attorneys for Trustee.

RUSSELL B. SEYMOUR and DANIEL W. GAGE,

Attorneys for Objectors to Proposed Compromise.

ROBERT H. SHUTAN,

Attorney for Bill Lepper Motors, Inc.

JAMES T. BYRNE,

Attorney for Consolidated Casting Company.

I.

Statement of the Case

This is an involuntary bankruptcy commenced February 19, 1951. On the same date a petition for appointment of a receiver was filed. On February 20, 1951, an order was entered appointing Leslie S. Bowden as receiver. He thereupon qualified. With the approval of the Court, Russell B. Seymour was appointed as his attorney. On March 12, 1951, a petition for an order to show cause and for a temporary restraining order against Title Insurance & Trust Co. was filed. On March 16, 1951, a request for an admission of facts under Rule 36 of Federal Rules of Civil Procedure was filed. On March 28, 1951, a motion and notice of motion for summary judgment under Rule 56 of Federal Rules of Civil Procedure were filed. On April 3, 1951, a petition was filed by Bill Lepper Motors, Inc., for leave to proceed with foreclosure sale of trust deed. An adjudication was made on April 13, 1951. On May 3, 1951, notice of taking of deposition under Rule 26 of Federal Rules of Civil Procedure was filed. On

May 3, 1951, an answer was filed by the receiver to the petition for leave to proceed with foreclosure sale of trust deed filed by Bill Lepper Motors, Inc. On May 24, 1951, a petition was filed by the receiver for an order determining the rights of Consolidated Casting Company in said real property. [13]

On May 29, 1951, an answer thereto was filed by Bill Lepper Motors, Inc. On May 29, 1951, notice of motion was filed by Bill Lepper Motors, Inc., to strike the petition for order to show cause filed by the receiver on May 24, 1951, and, in the alternative, to strike certain portions of the said petition. The bankrupt's schedules were filed May 29, 1951. On June 14, 1951, an order was entered appointing Frank M. Chichester as trustee in bankruptcy. He thereupon qualified. With the approval of the Court, Ehrlich and Blonder were appointed as his counsel. On June 14, 1951, an order was entered authorizing the receiver to sell real property free and clear of liens. On June 27, 1951, the bankrupt filed its statement of affairs.

On July 27, 1951, an order was entered confirming the sale of certain real property. On July 31, 1951, the trustee filed his petition requiring California By-Products Corporation, among others, to show the claim, if any, of California By-Products Corporation to certain accrued and unpaid rentals; and also requiring Consolidated Casting Company to set forth the amount of rent due from and unpaid by it for the occupation of certain premises, and to pay to the trustee any and all rentals due from it to the trustee or the bankrupt. On July 31, 1951, the

trustee filed a petition against California By-Products Corporation and another requiring California By-Products Corporation to set forth what assets it had in its possession belonging to the bankrupt or the trustee; and to set forth what arrangement it had with the bankrupt regarding the possession, if any, of the bankrupt's assets and what claims or liens, if any, it may have had against any property of the bankrupt in its possession; and to surrender forthwith to the trustee any property belonging to the bankrupt which it had in its possession. On July 31, 1951, the trustee filed [14] his petition against Consolidated Casting Company and another requiring the said Consolidated Casting Company to present and disclose to the Court all the evidence and facts showing what steps, if any, were taken by it to foreclose a chattel mortgage upon certain equipment; and what steps, if any, were taken to conduct the foreclosure sale of the said property; and what claims, if any, it had against this property; and for an order adjudging that the chattel mortgage foreclosure proceedings were ineffective, null and void and that the property covered by said chattel mortgage belongs to the bankrupt or the trustee and is a part of the bankrupt estate.

On August 8, 1951, California By-Products Corporation filed an answer to the petition of the trustee relating to the machinery and equipment, in which it denies that it had in its possession any assets belonging to the bankrupt; and alleges that certain assets of the bankrupt were moved to the

premises of California By-Products Corporation for storage, and that any of such property which the bankrupt did not sell within a period of sixty days became the property of California By-Products Corporation, and that certain of the items of such property were sold within the sixty-day period by the bankrupt, and that certain other items were not sold and became the property of California By-Products Corporation by reason of said agreement. On August 8, 1951, the California By-Products Corporation filed its answer to the trustee's petition against it in regard to rentals, in which it denies that the trustee is entitled to receive any rentals which were due from Industrial Associates; and alleges that California By-Products Corporation agreed to sell to the bankrupt certain aluminum scrap and ingot, and as security for merchandise theretofore delivered to and by the bankrupt, [15] the bankrupt assigned all rentals due as security until all monies due it had been repaid to California By-Products Corporation, and that notice of such assignment had been duly recorded under the state law, and that the bankrupt was indebted to California By-Products Corporation in the sum of $16,244.07; and denies the trustee any relief by reason of said petition.

On August 17, 1951, Bill Lepper Motors, Inc., a corporation, filed an answer to the trustee's petition relative to the chattel mortgage and alleged that the foreclosure sale was conducted in all respects in accordance with the law. On August 17, 1951, Bill Lepper Motors, Inc., a corporation, filed an answer to the trustee's petition regarding the rentals and

alleged that they should be paid to Bill Lepper Motors, Inc. On September 11, 1951, Bill Lepper Motors, Inc., a corporation, filed its petition for an order directing trustee to pay to it the sum of $64,-944.07 alleged to be due it under a certain deed of trust. On September 25, 1951, the trustee filed his answer in opposition to the petition of Bill Lepper Motors, Inc., a corporation, for an order directing the trustee to pay to it any money under said deed of trust; and for an order that the trust deed held by Bill Lepper Motors, Inc., a corporation, is null and void and of no effect; and for an order adjudging and decreeing that Bill Lepper Motors, Inc., a corporation, was indebted to the bankrupt estate in an amount equal to the personal property converted by it as a result of the chattel mortgage foreclosure sale; and for an order adjudging and decreeing the respective rights of the parties to the funds in the hands of the trustee received by him as the purchase price for the real property in question. On September 26, 1951, a motion was made by California By-Products Corporation, a corporation, to [16] dismiss the petition filed by Bill Lepper Motors, Inc., a corporation, for money to be paid to it under said deed of trust. On September 27, 1951, Daniel W. Gage and Russell B. Seymour representing, respectively, California By-Products Corporation, and E. S. Haven, Armand J. Pihlblad and Sonnett Supply Company, creditors, and Russell B. Seymour representing Leslie S. Bowden, the receiver in bankruptcy, filed a petition for the Court to take such action as may appear proper under the

allegations of the petition. On September 28, 1951, an order was entered authorizing California By-Products Corporation, a corporation, E. S. Haven, Armand J. Pihlblad and Sonnett Supply Company, creditors, to file herein an answer to the claims of Bill Lepper Motors, Inc., a corporation. On October 1, 1951, such an answer was filed by said creditors. On October 15, 1951, the trustee filed herein his petition for leave to compromise controversy. This petition covers all this previous litigation and presents a proposed compromise of the controversies upon the basis of the payment by Consolidated Casting Company of $20,000 to the estate and the sum of $1,500 to Bill Lepper Motors, Inc., a corporation, to reduce its allowed claim by $1,500, thus making available to the estate $21,500, provided there be no further hearings in connection with these matters and all litigation in connection with the same be dropped.

On October 30, 1951, creditors E. S. Haven, Armand J. Pihlblad, Sonnett Supply Company and California By-Products Corporation, a corporation, filed their objections to the proposed compromise and, also, made demand up the trustee that certain actions be brought.

On November 15, 1951, findings of fact, conclusions of law and order were entered authorizing the compromise of the controversies pursuant to the trustee's position. On [17] November 23, 1951, California By-Products Corporation, E. S. Haven, Armand J. Pihlblad and Sonnett Supply Corporation

filed herein their petition for a review of the order authorizing the compromise.

The trustee reports that he has received a cashier's check for the $20,000; that Bill Lepper Motors, Inc., a corporation, has gone on record agreeing to reduce its claim $1,500; that he has on hand some $10,000 in cash; and that if the order approving the compromise of the controversy stands, there will be some $31,500 available in the estate for distribution.

II.

Statement of the Evidence

No evidence other than the record of the case as above set forth, of which the Court is permitted to take judicial notice (McLeod v. Boone, CCA 9, 34 ABR (NS) 490, 91 F. (2) 71), was received, although evidence in support of their objections to the compromise was offered by the objecting creditors. The Referee, however, stated to the objecting creditors that he would deny the petition to compromise and permit them to go ahead with the litigation provided they indemnified the estate against all costs and expenses and also guaranteed the estate, by a bond or otherwise, that in the end the estate would receive at least $21,500. This offer of the Referee was declined by the objecting creditors. The Referee did not take any evidence upon the objections raised and did not pass upon their merits since to do so would have meant that the offer to compromise would be withdrawn. [18]

III.

Question Presented

Was the order confirming the compromise of the controversy justified under all the circumstances of the case?

IV.

Comment on the Law

The approval or disapproval of a proposed compromise of a controversy rests within the sole discretion of the referee, and his decision will not be set aside except for clear error or abuse of discretion. In re Truscott Boat & Dock, W. D. Mich., 92 F. Supp. 430; Drexel v. Loomis, CCA 8, 15 ABR (NS) 405, 35 F. (2) 800.

Where the trustee refuses to act pursuant to the request of creditors, the Court may authorize the creditors to act in the name of the trustee upon such conditions as to costs and security as may seem proper. Johnson v. Barney, CCA 8, 19 ABR (NS) 52, 53 F. (2) 770. See, also, In re American Fidelity, a decision by the late Judge Jenney of this Court, 40 ABR (NS) 379, 28 F. Supp. 462. In our case here the Referee felt that it would not be fair to the creidtors generally to reject the proposed compromise and go ahead with further hearings and litigation unless security was furnished by the objecting creditors for costs and expenses and to insure the estate that in the end it would obtain at least $21,500 by reason of the litigation to be conducted by the objecting creditors.

In determining whether a proposed compromise

of controversy should be approved or rejected by the Court, one of the factors to be considered is the paramount interest of the creditors as a whole and a proper deference to their [19] reasonable views in the premises. Drexel v. Loomis, supra.

V.

Findings of Fact and Conclusions of Law

These were entered herein, as above indicated, on November 15, 1951.

VI.

Documents Accompanying This Certificate

1. Petition for Appointment of Receiver, filed February 19, 1951;

2. Petition for Order to Show Cause and for Temporary Restraining Order, filed March 12, 1951;

3. Temporary Restraining Order and Order to Show Cause, entered March 12, 1951;

4. Request for Admission of Facts under Rule 36 of Federal Rules of Civil Procedure, filed March 16, 1951;

5. Motion and Notice of Motion for Summary Judgment under Rule 56 of Federal Rules of Civil Procedure, filed March 28, 1951;

6. Petition for Leave to Proceed with Foreclosure Sale of Trust Deed, filed April 3, 1951;

7. Notice of Taking of Deposition under Rule 26 of Federal Rules of Civil Procedure, filed May 3, 1951;

8. Answer to Order to Show Cause, filed May 3, 1951;

9. Petition for Order to Show Cause, filed May 24, 1951;

10. Answer of Respondent Bill Lepper Motors, Inc., filed May 29, 1951;

11. Notice of Motion to Strike, filed May 29, 1951;

12. Order to Sell Real Property Free and Clear of Liens, entered June 14, 1951; [20]

13. Order Confirming Sale of Real Property, entered July 27, 1951;

14. Petition for Order to Show Cause against Industrial Associates, California By-Products Corporation, Bill Lepper Motors, Inc., and Consolidated Casting Co. re Rentals, filed July 31, 1951;

15. Petition for Order to Show Cause against California By-Products Corporation and Bill Lepper Motors, Inc., re Certain Machinery and Equipment, filed July 31, 1951;

16. Petition for Order to Show Cause against Bill Lepper Motors, Inc., and Consolidated Casting Co. re Chattel Mortgage, filed July 31, 1951;

17. Answer in Opposition to Petition for Order and Order to Show Cause against California By-Products Corporation and Bill Lepper Motors, Inc., re Certain Machinery and Equipment, filed August 8, 1951;

18. Answer in Opposition to Petition for Order and Order to Show Cause against Industrial Associates, California By-Products Corporation, Bill Lepper Motors, Inc., and Consolidated Casting Co. re Rentals, filed August 8, 1951;

19. Answer to Trustee's Petition re Chattel Mortgage, filed August 17, 1951;

20. Answer of Bill Lepper Motors, Inc., to Trustee's Petition re Rentals, filed August 17, 1951;

21. Petition for Order Directing Trustee to Pay Money, filed September 11, 1951;

22. Answer of Frank M. Chichester, Trustee, in Opposition of Petition of Bill Lepper Motors, Inc., for Order Directing Trustee to Pay Monies, filed September 25, 1951;

23. Motion to Dismiss under Rule 12, Federal Rules of Civil Procedure, filed September 26, [21] 1951;

24. Petition filed September 27, 1951;

25. Order Authorizing Creditors to Present Defenses and Claims in Behalf of the Estate, entered September 28, 1951;

26. Answer and Counterclaim Filed by Creditors, filed October 1, 1951;

27. Petition of Trustee for Leave to Compromise Controversy, filed October 15, 1951;

28. Objections to Proposed Compromise, filed October 30, 1951;

29. Demand upon Trustee that Actions Be Brought, filed October 30, 1951;

30. Objections to and Disapproval of Order Authorizing Compromise of Controversy, Findings of Fact, and Conclusions of Law, filed November 13, 1951;

31. Order Authorizing Compromise of Controversy, Findings of Fact, Conclusions of Law, entered November 15, 1951;

32. Petition for Review, filed November 23, 1951.

Dated this 8th day of February, 1952.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed February 8, 1952. [22]

[Title of District Court and Cause.]

PETITION FOR APPOINTMENT OF RECEIVER

To the Honorable the District Court of the United States, Southern District of California, Central Division:

The petition of the undersigned respectfully shows:

That he is a creditor of the alleged bankrupt herein with a claim in the amount indicated below.

That it is necessary that a Receiver be appointed for each of the following reasons:

That the alleged bankrupt is the insured under a Fidelity Bond with Lumbermen's Mutual Casualty Co., being Bond No. 20035204-C.B., against defalcations against its employers by its officers and employees.

That prior hereto a claim for the full amount of said bond, $10,000.00, was filed with said insurance company.

That under the terms of said bond, it is necessary

that additional information be furnished immediately to said insurance [23] company.

That in spite of demand made upon the alleged bankrupt by its creditors, the alleged bankrupt has failed and refused to furnish such information to said insurance company.

Your petitioner is informed, believes and, therefore, alleges that unless such information be furnished immediately the liability of said insurance company may terminate.

That the business of the bankrupt consists of the casting business located at 1601 East El Segundo Boulevard, El Segundo, California, which is of the reasonable value of at least $95,000.00. That same said property is encumbered with a trust deed and chattel mortgage to secure payment of the sum of approximately $60,000.00. That a default has been declared under the terms of said trust deed and chattel mortgage and a foreclosure thereof will be conducted by the holder of said encumbrance unless restrained by Court.

That all of said property is now in the possession of Lepper Motors, Inc.

That it is the opinion of the petitioner that a bond for the Receiver in the sum of $2500.00 will be sufficient until such time as further assets come into his hands.

Wherefore, petitioner prays that an order be made appointing a Receiver herein with all powers

which may be granted to a receiver under the provisions of the Bankruptcy Act.

/s/ ARMAND J. PIHLBLAD.

/s/ RUSSELL B. SEYMOUR,
Attorney for Petitioner.

Duly verified.

[Endorsed] : Filed February 19, 1951, [24] Referee.

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE AND FOR TEMPORARY RESTRAINING ORDER

To the Honorable Reuben G. Hunt, Referee in Bankruptcy:

The petition of Leslie S. Bowden respectfully shows:

That he is the duly appointed, qualified and acting Receiver herein.

That one of the assets of the alleged bankrupt appears to be that certain real property in the City of El Segundo, County of Los Angeles, State of California, described as follows, to wit:

> Lots 296 to 300 inclusive in Block 123 of El Segundo Tract in the City of El Segundo, as per map recorded in Book 22, Pages 106 and 107 of maps in the office of the County Recorder of said county,

together with the buildings and improvements located thereon.

That said property apparently is encumbered with a [26] Deed of Trust dated April 14, 1947, wherein Title Insurance & Trust Company is the trustee, and your petitioner is informed, believes and, therefore, alleges Bill Lepper Motors, Inc., a California corporation, is the beneficiary by virtue of an assignment made by the original beneficiary, to wit: Reconstruction Finance Corporation. That a default in the terms of said Deed of Trust has been declared and the said trustee proposes to sell all of said property on March 14, 1951, at 11:00 o'clock a.m., in order to secure payment of the amounts assertedly owing under the terms of the note secured by said Deed of Trust, to wit: the amount of $59,390.00 with interest from April 14, 1950, and additional expenses and charges, the amount of which is unknown to your petitioner.

Your petitioner is informed, believes and, therefore, alleges that said real property is of the value of at least $95,000.00. Your petitioner is further informed, believes and, therefore, alleges that if said sale be held by said Title Insurance & Trust Company, the only bidder will be the beneficiary under said Deed of Trust, and that a sum no greater than the amount of said sums assertedly owing as aforesaid will be offered.

Your petitioner is informed, believes, and, therefore, alleges that if a sale of said property be postponed until such time as either the Receiver herein, or a Trustee in Bankruptcy later to be appointed

in the event of an adjudication, can offer said property for sale, a substantial equity will be procured for the benefit of the creditors of the estate.

Your petitioner is further informed, believes and, therefore, alleges that the said beneficiary Bill Lepper Motors, Inc., has other security, the amount of which is not now known to the Receiver, and has received payment on account of said indebtedness, the exact amount of which is not now known to your petitioner.

Your petitioner is further informed, believes [27] and, therefore, alleges that the transfer of said Deed of Trust to said Bill Lepper Motors, Inc., was made with the assistance of the alleged bankrupt herein and for the purpose of taking over the business of the alleged bankrupt, to wit: a casting business, and for the further purpose of hindering or delaying creditors of the alleged bankrupt. Your petitioner at this time is not fully advised as to the facts in connection therewith and makes this allegation presently for the purpose that the filing of the petition herein will not be deemed to be a waiver of such rights as otherwise may exist in favor of the receiver of the estate in bankruptcy.

Wherefore, petitioner prays that orders be made as follows:

1. Directing said Title Insurance & Trust Company and said Bill Lepper Motors, Inc., and each of them, to be and appear before this Court, at a time and place fixed in said order, to show cause, if any there be, why said proposed sale of said real

property under said Deed of Trust should not be restrained pending the further order of the Court, and

2. That an order be made forthwith restraining said Title Insurance & Trust Company, Bill Lepper Motors, Inc., and respective agents and employees, and each of them, from selling or offering for sale said real property, or any part thereof, pending the time of the above-mentioned hearing and pending a further order of Court, and

3. Granting such other and further relief as may be proper.

/s/ LESLIE S. BOWDEN,
Petitioner as Receiver
Aforesaid.

/s/ RUSSELL B. SEYMOUR,
Attorney for Said Petitioner.

Duly verified.

[Endorsed]: Filed March 12, 1951, Referee. [28]

[Title of District Court and Cause.]

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

On the reading and filing of the duly verified petition of Leslie S. Bowden, receiver herein, and good cause appearing therefrom and on motion of Russell B. Seymour, attorney for said petitioner,

no adverse interests appearing thereat, now, therefore,

It Is Ordered that Title Insurance & Trust Company, Bill Lepper Motors, Inc., and each of them, be and appear before this Court on the 20th day of March, at the hour of 2:00 o'clock p.m., Room 327, Federal Building, Los Angeles 12, California, to then and there show cause, if any there be, why they and each of them should not be restrained from selling or offering for sale the following described real property, to wit:

> Lots 296 to 300 inclusive in Block 123 of El Segundo Tract in the City of El Segundo, as per map recorded in Book 22, Pages 106 and 107 of maps in the office of the County Recorder of said county, together with the [30] buildings and improvements located thereon.

It Is Further Ordered that pending the hearing referred to, the said Title Insurance & Trust Company, Bill Lepper Motors, Inc., and respective agents and employees and each of them, be and they hereby are restrained and enjoined from selling or offering for sale any interest in or to the above-described real property and in particular in respect to that certain sale proposed to be held by said trustee on March 14, 1951, at the hour of 11:00 o'clock a.m.

It Is Further Ordered that if any contest is to be made in this matter either by said Title Insurance & Trust Company or said Bill Lepper Motors, Inc., a written pleading be served upon the attorney for

the receiver, Russell B. Seymour, and the original thereof filed with this Court at least two days prior to the date fixed for said hearing.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

Dated March 12, 1951.

[Endorsed]: Filed March 12, 1951, Referee. [31]

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS UNDER RULE 36 OF FEDERAL RULES OF CIVIL PROCEDURE

To Superior Casting Company, Inc., a California corporation, Alleged Bankrupt; John D. Gray, stockholder, and John D. Gray, Attorney for alleged Bankrupt, 639 South Spring Street, Los Angeles 14, California:

You, and each of you, are hereby requested to admit, on or before March 26, 1951, the truth of the following facts and each of them.

1. The alleged bankrupt herein, Superior Casting Company, Inc., has no claim of offset against Armand J. Pihlblade.

2. The alleged bankrupt herein, Superior Casting Company, Inc., has no claim of counterclaim against Armand J. Pihlblade.

3. Armand J. Pihlblade is not indebted to the alleged bankrupt herein.

4. Armand J. Pihlblade has no security for his claim.

5. The alleged bankrupt herein, Superior Casting Company, Inc., has no claim of offset against Sonnett Supply Co. [23]

6. The alleged bankrupt herein, Superior Casting Company, Inc., has no claim of counterclaim against Sonnett Supply Co.

7. Sonnett Supply Co. is not indebted to the alleged bankrupt herein.

8. Sonnett Supply Co. has no security for its claim.

9. The alleged bankrupt herein, Superior Casting Company, Inc., has no claim of offset against E. F. Haven, doing business as E. F. Haven & Associates.

10. The alleged bankrupt herein, Superior Casting Company, Inc., has no claim of counterclaim against E. F. Haven, doing business as E. F. Haven & Associates.

11. E. F. Haven, doing business as E. F. Haven & Associates, is not indebted to the alleged bankrupt herein.

12. E. F. Haven, doing business as E. F. Haven & Associates, has no security for his claim.

13. On or about October 25, 1950, and within

four months immediately preceding the date of bankruptcy, February 19, 1951, the alleged bankrupt was indebted to The Pacific Telephone & Telegraph Company in the amount of $164.77.

14. At said time, on or about October 25, 1950, The Pacific Telephone & Telegraph Company had no security of the alleged bankrupt.

15. At said time, on or about October 25, 1950, the alleged bankrupt paid to said The Pacific Telephone & Telegraph Company the sum of $164.77.

16. Said payment of $164.77 was made by the alleged bankrupt in payment of said indebtedness of $164.77.

Dated this 16th day of March, 1951.

/s/ RUSSELL B. SEYMOUR,
Attorney for Petitioning Creditors.

Affidavit of Service by mail attached.

[Endorsed]: Filed March 16, 1951, Referee. [33]

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION FOR SUMMARY JUDGMENT UNDER RULE 56 OF FEDERAL RULES OF CIVIL PROCEDURE

To Superior Casting Company, Inc., a California corporation, alleged bankrupt; John D. Gray,

stockholder, and John D. Gray, attorney for alleged bankrupt, 639 South Spring Street, Los Angeles 14, California:

You, and each of you, are hereby notified that on the 12th day of April, 1951, at the hour of 2:00 o'clock p.m., the undersigned, Russell B. Seymour, as attorney for the petitioning creditors herein, will move for a summary judgment adjudging Superior Casting Company, Inc., to be bankrupt within the purview of the Bankruptcy Act.

The grounds for said motion will be that the matters of defense set forth in the answer of the bankrupt in conjunction with matters contained in the request for admission of facts under Rule 36 of the Federal Rules of Civil Procedure do not set up facts sufficient to constitute a defense to the creditors' petition filed herein in respect to the first account of bankruptcy set out in [35] Paragraph VII of said creditors' petition. The said motion will be based upon the records and files of this proceeding, including, among other things, said creditors' petition, the answer filed thereto, said request for admission of facts under Rule 36 of Federal Rules of Civil Procedure, and the purported answer to request for admission of facts.

Points and authorities are attached hereto.

/s/ RUSSELL B. SEYMOUR,
Attorney for Petitioning
Creditors. [36]

Points and Authorities

Summary judgment is proper where there is a question of law but no issue of fact.

Federal Practice and Procedure Rules Ed. Barron and Holtzoff, Vol. 3, Section 1234, p. 72 et seq.

Bartle v. Travelers Ins. Co., 5th Circ. 1948, 171 Fed. 2d, 469.

New York State Guernsey Breeders' Co-Op v. Wickard 2d Circ. 1944, 141, Fed. 2d, 805.

Fox v. Johnson and Wimsatt, App. D.C. 1942, 127 Fed. 2d, 729.

The purported answer to request for admission of facts of the alleged bankrupt is ineffective. Denials responding to requests for admissions must be sworn to and an unverified statement or denial will be disregarded.

Beasley v. U. S. D.C.S.C., 1948, 81 Fed. Supp. 518.

Requirements that answers to requests for admissions be verified is not a mere technicality and failure to comply strictly with the requirement can not be waived.

Beasley v. U. S., D.C.S.C., 1948, 81 Fed. Supp. 518.

Fed. Rule of Civil Procedure, No. 36.

Fed. Rule of Civil Procedure, No. 56.

Batson v. Porter, 4th Circ. 1946, 154 Fed. 2d, p. 566. [37]

Walsh v. Connecticut Mutual Life Insurance Company, D.C. New York, 1939, 26 Fed. Supp. 566.

Federal Practice and Procedure Rules Ed. Vol. 3, Section 1234, p. 100.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 28, 1951, Referee. [38]

[Title of District Court and Cause.]

PETITION FOR LEAVE TO PROCEED WITH FORECLOSURE SALE OF TRUST DEED

To the Honorable Reuben G. Hunt, Referee in Bankruptcy:

The petition of Bill Lepper Motors, Inc., a California corporation, respectfully shows:

I.

That petitioner is a California corporation with its principal place of business in the County of Los Angeles, State of California.

II.

That one of the assets of the estate of this alleged bankrupt is certain real property located in the City of El Segundo, County of Los Angeles, State of California, described as follows:

Lots 296 to 300, inclusive, in Block 123 of El Segundo Tract in the City of El Segundo, as per map recorded in Book 22, pages 106 and

107 of maps in the office of the County Recorder of said county, [40] together with the buildings and improvements located thereon.

III.

That your petitioner is the holder, owner and beneficiary of a deed of trust on the above-described real property and improvements, which deed of trust is dated April 14, 1947, and executed by Superior Casting Company, Inc., and recorded May 2, 1947, in Book 24521, Page 242, Official Records, Los Angeles County.

That the original beneficiary of such deed of trust was Reconstruction Finance Corporation; and that said original beneficiary has heretofore and for a valuable consideration assigned such beneficial interest in said deed of trust to your petitioner.

That the present unpaid balance of principal owing on the obligation secured by said deed of trust is the amount of $59,390.00 and that in addition thereto there is also remaining unpaid interest and other charges.

That the alleged bankrupt has been in default under the terms of said deed of trust, and that your petitioner has heretofore caused such a default formally to be declared and noticed. That the Trustee under said deed of trust had heretofore set a date for the sale of such property, but that such sale has been restrained by order of this Court.

That the actual value of this real property and improvements is no greater than the amount owing to your petitioner under said deed of trust. That

the value of this property may decrease and thus subject your petitioner to serious financial loss as a result thereof.

That there has not been an adjudication in this matter; that the alleged bankrupt has indicated a contest to the Involuntary Petition in Bankruptcy herein by the filing of an Answer; and that therefore there is no Receiver or Trustee in this bankruptcy proceeding who is in a position to conduct an immediate sale and thus offer some protection to the interests of your petitioner. [41] That unless the present Restraining Order against your petitioner is vacated and the prayer of this petition granted, your petitioner as the beneficiary under such trust deed will sustain serious financial loss.

Wherefore, your petitioner prays for an order of this Court granting your petitioner and the Trustee under the deed of trust herein, leave and authority to proceed with the foreclosure sale under said deed of trust, and for such other relief as may be proper.

Dated this 2nd day of April, 1951.

/s/ ROBERT H. SHUTAN,
Attorney for Petitioner, Bill Lepper Motors, Inc.

Duly verified.

[Endorsed]: Filed April 3, 1951, Referee. [42]

[Title of District Court and Cause.]

NOTICE OF TAKING OF DEPOSITION UNDER RULE 26 OF FEDERAL RULES OF CIVIL PROCEDURE

To: Bill Lepper Motors, Inc., a corporation, petitioner herein, Wm. S. Lepper, president and managing officer of Bill Lepper Motors, Inc., Robert H. Shutan, 333 South Beverly Drive, Beverly Hills, California, attorney for said Bill Lepper Motors, Inc., and each of you:

Please Take Notice that on the 8th day of May, 1951, at the hour of 10:00 o'clock a.m., the receiver herein, Leslie S. Bowden, by his attorney, Russell B. Seymour, will under Rule 26 of the Federal Rules of Civil Procedure take the deposition of Bill Lepper Motors, Inc., a corporation, by examination of Wm. S. Lepper, president and managing officer of said Bill Lepper Motors, Inc.; and that said deposition will be taken before C. W. McClain, a notary public in and for the County of Los Angeles, State of California, in the courtroom of the Honorable Reuben G. Hunt, Referee in Bankruptcy, Room 327, Federal Building, Los Angeles 12, California. [44]

Notice Is Further Given that should you wilfully fail to attend at the said time and place, or if you should willfully fail to permit your deposition to be taken, appropriate relief will be sought under the provisions of Rule 37d of the Federal Rules of Civil Procedure.

Dated: This 3rd day of May, 1951.

/s/ RUSSELL B. SEYMOUR,
Attorney for said Receiver,
Leslie S. Bowden.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 3, 1951, Referee. [45]

[Title of District Court and Cause.]

ANSWER TO ORDER TO SHOW CAUSE

To the Honorable Reuben G. Hunt, Referee in Bankruptcy:

Comes now Leslie S. Bowden, receiver in the above entitled matter and answers the petition for leave to proceed with foreclosure sale of trust deed filed by Bill Lepper Motors, Inc., a California corporation as follows:

I.

Admits allegations of paragraph I of said petition.

II.

Admits the allegations contained in paragraph II of said petition.

III.

Admits that the said petitioner is the record holder, owner and beneficiary of a deed of trust on the above described real property, and improvements, said deed of trust being dated October 14,

1947, and executed by Superior Casting Company, Inc., and recorded May 2, 1947, in book 24521, page 242, Official Records of [47] Los Angeles County, but in this connection, upon belief, denies that the said petitioner is the beneficial holder, owner or beneficiary of said deed of trust and alleges that said petitioner holds said deed of trust for the use and benefit of the bankrupt herein and of the receiver.

Admits that the original beneficiary of such deed of trust was Reconstruction Finance Corporation; and admits that said Reconstruction Finance Corporation assigned said deed of trust to the said petitioner, but in this connection, again, upon information and belief, the receiver alleges that said petitioner holds said deed of trust for the use and benefit of the bankrupt herein and the receiver.

For lack of information or belief and upon that ground, the receiver denies that there is any sum whatsoever owing under the obligation secured by said deed of trust.

The receiver admits that the bankrupt has been in default under the terms of said deed of trust and that the petitioner has heretofore caused such default formally to be declared and noticed and that the trustee under said deed of trust has heretofore set a date for the sale of said property and that said sale has been and now is restrained by order of this Court.

The receiver denies that the actual value of said real property and improvements is no greater than the amount owing to the petitioner from the said

deed of trust and upon information and belief alleges that said property is of a value of at least $80,000.00 to $100,000.00

That since the filing of said petition the said Superior Casting Company, Inc., has been adjudged a bankrupt but to the date hereof no trustee has been appointed.

The receiver denies that the petitioner will sustain any loss if the present restraining order shall be continued for a reasonable time for the following purposes among others: [48]

1. To permit a sale of the property by the Trustee in bankruptcy when duly appointed and qualified.

2. To abide the results of the determination of a court of the rights of the parties herein.

IV.

Each and all allegations of said petition not herein specifically admitted are denied.

And as a Matter of Further Defense

The receiver alleges that examinations and investigations are now being conducted by the receiver to develop such evidence as there may be in respect to the rights of the parties herein and such examinations are not yet concluded.

The taking of a deposition, under Rule 26 of the Federal Rules of Civil Procedure, of Bill Lepper Motors, Inc., the petitioner, by examination of Wm. S. Lepper, president and managing officer of said

Bill Lepper Motors, Inc., is now fixed for the 8th day of May, 1951, at the hour of 10:00 o'clock a.m. In the event that further defenses to the petition herein are developed through said depositions or otherwise, the receiver prays leave to file an amended or supplemental answer.

/s/ RUSSELL B. SEYMOUR,
Attorney for Leslie S.
Bowden, Receiver.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 3, 1951, Referee. [49]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE

To the Honorable Reuben G. Hunt, Referee in Bankruptcy:

The petition of Leslie S. Bowden respectfully shows:

That he is the duly appointed, qualified and acting Receiver herein.

That one of the assets of the within estate consists of the following described property, to wit:

> Lots 296 to 300, inclusive, in Block 123 of El Segundo Tract in the City of El Segundo, as per map recorded in Book 22, Pages 106 and 107 of maps in the office of the County Recorder of said county, together with the buildings and improvements located thereon.

That said property apparently is encumbered with a Deed of Trust dated April 14, 1947, recorded May 2, 1947, in Book 24521, page 242, Official Records of Los Angeles County, wherein Title Insurance and Trust Company is the trustee and, your petitioner [51] is informed, believes and, therefore, alleges, Bill Lepper Motors, Inc., a California corporation, appears to be the beneficiary by reason of an assignment made by the original beneficiary, to wit: Reconstruction Finance Corporation.

That said Trustee and said beneficiary claim that there is owing under the terms of the note secured by said Deed of Trust the sum of approximately $59,390.00, with interest from April 14, 1950, and additional expenses and charges the amount of which is unknown to your petitioner.

That on or about the 1st day of November, 1950, said Bill Lepper Motors, Inc., purported to lease a portion of the above-described premises to Consolidated Castings Co. for a period of five years from that date.

That said premises can be sold to the best advantage of the estate free and clear of liens and encumbrances, including the lease assertedly held by the said Consolidated Castings Co.

It is the contention of the Receiver and he, therefore, alleges that any rights which said Consolidated Castings Co. may possess in or to said premises by virtue of said asserted lease are co-extensive with and dependent upon the lien on said premises held by the said Bill Lepper Motors, Inc., and that upon payment of any obligation owing to said Bill Lepper Motors, Inc., or upon termination of any lien held

by Bill Lepper Motors, Inc., the said leasehold interest of Consolidated Castings Co. was or will be no longer effective.

The petitioner further alleges that he has heretofore filed certain pleadings in connection with other proceedings now pending between the petitioner and said Title Insurance and Trust Company and Bill Lepper Motors, Inc., in which pleadings the petitioner has referred generally to certain defenses to and claims against said Bill Lepper Motors, Inc., particularly in respect to the validity of said Deed of Trust and a Chattel Mortgage [52] held by Bill Lepper Motors, Inc.

It appears that said defenses and claim may, likewise, exist against Consolidated Castings Co. The petitioner has not completed his investigation concerning said matters and is unable at this time fully to set forth such defenses or claims and is unable at this time adequately to present such matters to the Court. Some of said matters are as follows:

(1) During the month of October, 1950, said Bill Lepper Motors, Inc., purported to sell certain personal property of the bankrupt subject to a chattel mortgage securing the same obligation as is secured by said deed of trust. Said personal property was of the reasonable value of at least $18,700.00 and was assertedly purchased by Consolidated Castings Co. at said purported sale for the sum of $1500.00 and said Consolidated Castings Co. now claims to be the owner of said personal property.

(2) The petitioner further alleges that at the time said Bill Lepper Motors, Inc., took possession of the real property of the bankrupt, there was located thereon sundry personal property consisting of supplies of fluxes, oils, and office furnishings and equipment of the estimated reasonable value of $5,000.00, not subject to the asserted lien of Bill Lepper Motors, Inc., and that all thereof was converted by said Bill Lepper Motors, Inc., and Consolidated Castings Co. to their own use.

(3) That said Bill Lepper Motors, Inc., acquired the obligation secured by said trust deed and chattel mortgage from the Reconstruction Finance Corporation by arrangements made with the [53] bankrupt for the purpose of taking over all of the assets of the bankrupt to the exclusion of creditors of the bankrupt. That the bankrupt was then insolvent. That the said Bill Lepper Motors, Inc., without any consideration passing to the bankrupt or its creditors, entered upon the said premises, took over all assets of the bankrupt including said property not subject to the lien of said Reconstruction Finance Corporation obligation, secured to itself existing customers of the bankrupt and transferred said business to said Consolidated Castings Co. who since about November 1, 1950, has been operating said business at a substantial profit, the exact amount thereof being unknown to the petitioner. That said Consolidated Castings Co. at all times has been and now is an agent and alter ego of said Bill Lepper Motors, Inc. That said purported five-year lease of the premises made by Bill Lepper Motors, Inc., to

Consolidated Castings Co. was made for the purpose of depressing, and did depress, the saleable value of said premises.

That said Bill Lepper Motors, Inc., has in open Court consented to the making of an order for the receiver, or the trustee to be appointed, to sell said real property free and clear of liens, with a provision that such rights as the parties may have shall attach to the proceeds of the sale of said property.

Your petitioner further alleges that prior to bankruptcy the bankrupt entered into a lease of another portion of said premises with Industrial Associates at a monthly rental of $600.00 per month, no part of said rental has been paid for the period commencing November 1, 1950, and payable for the period ending May 31, 1951. [54] Claims are made to said unpaid funds by said Bill Lepper Motors, Inc., and California By Products Corporation, each of whom has agreed with the Receiver that the Court may make its order directing payment of said rentals and any subsequent rentals to the Receiver, same to be held by the Receiver abiding further orders of the Court.

Wherefore, petitioner prays that an order be issued requiring Bill Lepper Motors, Inc., Consolidated Castings Co., Industrial Associates, Title Insurance and Trust Company and California By Products Corporation and each of them to be and appear before this Court at a time and place fixed in said order to show cause, if any there be, why the following further order or orders should not be made:

I.

Ordering that said real property shall be sold by the receiver herein, or a trustee to be appointed, free and clear of any lien or claim by any of said persons with a provision that such rights as any of the parties may have shall attach to the proceedings of such sale.

II.

Ordering, adjudging and decreeing that any leasehold interest or other right of said Consolidated Castings Co. is coextensive with and dependent upon any lien of said Bill Lepper Motors, Inc., and that said leasehold interest, if any, is terminated (a) on the making of said order to sell said property free and clear of encumbrances, or (b) upon sale of the property by this Court; and requiring said Consolidated Castings Co. to deliver possession of said premises to the receiver at such time as may be fixed by the Court.

III.

Requiring said parties and each of them to set up in writing such claim against said property as may exist or to be forever barred from asserting any claim to or against said property. [55]

IV.

Permitting the receiver, or the trustee to be appointed, to set up and prosecute such defenses or claims which he may have against any of said parties.

V.

Require said Industrial Associates to pay over to

the receiver all rentals now owing or hereafter accruing by reason of its use of said real property.

VI.

Granting such other and further relief as may be proper to the Court.

/s/ LESLIE S. BOWDEN,
Petitioner.

/s/ RUSSELL B. SEYMOUR,
Attorney for Petitioner.

Duly Verified.

[Endorsed]: Filed May 24, 1951. [56]

[Title of District Court and Cause.]

ANSWER OF RESPONDENT, BILL LEPPER MOTORS, INC.

Comes Now respondent Bill Lepper Motors, Inc., a California corporation, and appearing for itself alone, answers the petition of Leslie S. Bowden, Receiver herein, by admitting, denying and alleging as follows:

I.

Said respondent Bill Lepper Motors, Inc., denies each and every allegation contained in said petition except as follows:

The allegations set forth page 1, line 19 through page 2, line 13;

Page 4, line 28 through page 5, line 5.

II.

Said respondent specifically denies the allegations set forth in the paragraph commencing on line 23, page 4, except that said respondent admits that in open Court it consented to the making of an order for the Receiver or Trustee to sell said real property free and clear of the Deed of Trust owned and held by [58] said respondent upon the strict conditions that such sale be held without delay and that the lien of respondent for the entire balance due on said note and trust deed together with interest and proper costs attach to the proceeds of said sale.

III.

Referring to paragraph III of the prayer of said petition which does not appear to be based upon allegations in the petition, respondent Bill Lepper Motors, Inc., desires to call to the attention of this Court that it has heretofore set forth its claim against this property by filing with this Court a "Petition for Leave to Proceed with Foreclosure Sale of Trust Deed" on or about the 2nd day of April, 1951.

Wherefore, respondent Bill Lepper Motors, Inc., prays that petitioner herein be granted no order against said respondent beyond an order of Court directing a Receiver or Trustee to make an immediate sale of the real property of this estate subject to the lien rights of respondent by virtue of respondent's Deed of Trust being transferred to the proceeds of such sale and such amount as may be

computed therefrom paid over to said respondent without delay.

Dated this 28th day of May, 1951.

/s/ ROBERT H. SHUTAN,
Attorney for Respondent,
Bill Lepper Motors, Inc.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 29, 1951, Referee. [59]

[Title of District Court and Cause.]

NOTICE OF MOTION TO STRIKE

To Leslie S. Bowden, Receiver, and Petitioner Herein, and to Russell B. Seymour, Esq., his Attorney:

You Will Please Take Notice that on Thursday, the 31st day of May, 1951, at 2 p.m. of said day, or as soon thereafter as counsel can be heard, in the courtroom of Honorable Reuben G. Hunt, Referee in Bankruptcy, Federal Building, Los Angeles, California, respondent Bill Lepper Motors, Inc., will move the Court for an order striking out in its entirety the Petition for Order to Show Cause heretofore executed by petitioner on May 24, 1951, and subsequently served upon said Bill Lepper Motors, Inc., as one of the respondents therein.

Said motion will be made upon the grounds that the allegations of said petition including attempted

joinders of various parties as respondents, and the attempted joinder of a number of alleged causes of action constitutes a misjoinder of parties, a misjoinder of causes of action; the allegations and alleged causes [61] of action are not separately stated, and the petition as a whole is so ambiguous, unintelligible and uncertain that said respondent Bill Lepper Motors, Inc., is unable to ascertain what allegations petitioner actually is making and what relief petitioner seeks from said respondent.

Said motion will be made upon the further ground that the allegations in said petition are insufficient to constitute any cause of action against respondent Bill Lepper Motors, Inc.

Said respondent will, at above stated time and place, also move the Court for an order striking out the allegations contained in said petition as follows:

> Page 2, line 26 of said petition through and including page 4, line 21 of said petition, on the ground that the material contained therein is irrelevant, uncertain and unintelligible and by the very language of petitioner, does not even constitute an allegation or allegations.

Said respondent will further move the Court at said date and place for an order striking out the following portion of said petition:

> The words "Bill Lepper Motors, Inc." from line 7, page 5 of said petition;
>
> Lines 30 through 32 of page 5 of said petition;
>
> Lines 1 through 4, page 6 of said petition.

Said motion will be made upon the grounds that no allegations in said petition provide any basis or support for the relief requested in the lines which respondent will move to strike.

Dated this 28th day of May, 1951.

/s/ ROBERT H. SHUTAN,
Attorney for Bill Lepper
Motors, Inc.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 29, 1951, Referee. [62]

[Title of District Court and Cause.]

ORDER TO SELL REAL PROPERTY FREE AND CLEAR OF LIENS

The receiver herein, Leslie S. Bowden, having filed a petition for an order directing the sale of certain real property, to wit:

> Lots 296 to 300, inclusive, in Block 123 of El Segundo Tract in the City of El Segundo, as per map recorded in Book 22, Pages 106 and 107 of Maps, in the office of the County Recorder of Los Angeles County, State of California, together with buildings and improvements located thereon

free and clear of liens, and a hearing of said petition having duly come on for hearing on May 31, 1951, at the hour of 2:00 o'clock p.m., Russell B.

Seymour appearing on behalf of said receiver and Robert H. Shutan appearing on behalf of Bill Lepper Motors, Inc., and it appearing that service of said petition and notice of hearing thereof had been regularly served upon said Bill Lepper Motors, [64] Inc., and Title Insurance & Trust Company, no appearance having been made, and no pleading having been filed, by said Title Insurance & Trust Company, and it having been stipulated that the said receiver and the bankrupt estate herein are the owners of said real property and that an order might be made directing the sale of said real property free and clear of any lien against said real property held by said Bill Lepper Motors, Inc., in particular that certain Deed of Trust dated April 14, 1947, recorded May 2, 1947, in book 24521, page 242, Official Records of Los Angeles County, State of California, wherein Title Insurance & Trust Company is the trustee and said Bill Lepper Motors, Inc., is the beneficiary by reason of an assignment made by the original beneficiary, to wit: Reconstruction Finance Corporation, and all other findings or conclusions of law other than herein stated having been waived, now, therefore, the Court makes its findings of fact and conclusions of law as follows:

Findings of Fact

I.

That the above-described real property is an asset of the estate of Superior Casting Company, Inc., a California corporation, Bankrupt, and the said Les-

lie S. Bowden is the duly appointed, qualified and acting receiver thereof.

II.

That the said Bill Lepper Motors, Inc., is the holder of the above-described Deed of Trust.

III.

That it will be to the best interests of the estate and of the parties hereto that said real property be sold free and clear of said lien. [65]

Conclusions of Law

That said real property should be sold free and clear of the above-described lien and Deed of Trust.

Order

Now, Therefore, It Is Ordered that said above-described real property be sold by the receiver, or a trustee of the estate heretofore appointed or to be appointed, free and clear of the above-described lien and Deed of Trust, subject to the following conditions:

1. That the net proceeds of said sale shall be no less than the sum of sixty-three thousand dollars ($63,000.00).

2. That the net proceeds of said sale shall be held by the said receiver or said trustee heretofore appointed or to be appointed, subject to the further order of this court.

3. That such liens as may be possessed by the said Bill Lepper Motors, Inc., or the said Title

Insurance & Trust Company be, and the same hereby are, transferred to the proceeds to be received from a sale of said real property.

4. That the receiver herein, or any trustee appointed or to be appointed herein, may, by appropriate proceedings and after reasonable notice to said Bill Lepper Motors, Inc., and Title Insurance & Trust Company, obtain a determination by this court of the validity, priority and extent of any lien claimed by said Bill Lepper Motors, Inc., and Title Insurance & Trust Company, and may present for determination any defenses or grounds which he may now or then possess, the Court expressly reserving jurisdiction [66] to determine any of said matters.

Dated: This 14th day of June, 1951.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

Approved:

/s/ ROBERT H. SHUTAN,
Attorney for Bill Lepper Motors, Inc.

/s/ RUSSELL B. SEYMOUR,
Attorney for Leslie S. Bowden, Receiver.

[Endorsed]: Filed June 14, 1951, Referee. [67]

[Title of District Court and Cause.]

ORDER CONFIRMING SALE OF REAL PROPERTY

The Honorable Reuben G. Hunt, Referee in Bankruptcy, having, on June 14th, 1951, made and entered his order directing the receiver or trustee of the above-entitled estate to sell certain real property of the above-entitled estate, to wit:

> Lots 296 to 300 inclusive in Block 123 of El Segundo Tract in the City of El Segundo, as per map recorded in Book 22, Pages 106 and 107 of Maps, in the office of the County Recorder of Los Angeles County, State of California, together with buildings and improvements thereon, excepting therefrom all minerals, oil, gas and hydro-carbon substances, reserved by Edlou Company, in deed recorded April 29, 1946, in book 23169, page 28 Official Records.

free and clear of liens, and Frank M. Chichester, having been appointed and having qualified as a trustee in bankruptcy in the above-entitled estate, and the said trustee having on July 10th, 1951, pursuant to previous notice to creditors, offered to sell the aforementioned real property, which said offering was made in the Courtroom of the Honorable Reuben G. Hunt, Referee in [68] Bankruptcy, Federal Building, Los Angeles, California; and the said real property having been offered for sale pursuant to and upon the terms set forth in the aforementioned order of this Court, dated June 14th, 1951;

and the said real property having been offered for sale subject to additional conditions, to wit:

That the trustee did not warrant or guarantee the validity or efficacy of any leases or leasehold interests which might exist on the aforementioned real property; and

That the trustee did not warrant or guarantee title to a large furnace and a crane system, located on the aforementioned real property; and

At said sale one Hugo E. Aleidis having been the high bidder for said property upon the aforementioned conditions, which said bid by the said Hugo E. Aleidis was the sum of $75,000.00 for said real property.

Now, therefore, It Is Ordered that the sale of the above-described real property by the trustee of the above-entitled estate to Hugo E. Aleidis, or his nominee, for the sum of $75,000.00 be and the same is hereby confirmed and approved, subject to the following conditions:

1. That the aforementioned sum of $75,000.00 is to be paid by the said Hugo E. Aleidis, or his nominee, as follows: $7,000.00 to be paid at once to the trustee and the balance of $68,000.00 to be deposited in an escrow to be opened with the Title Insurance and Trust Company.

2. That the trustee, through the aforementioned escrow, furnish the said Hugo E. Aleidis, or his nominee, with the usual form of policy of title insurance and that the trustee and the said purchaser, or his nominee pro-rate in the usual method such current taxes as may exist against the aforemen-

tioned property; and that the said Hugo E. Aleidis, or his nominee, be given the privilege of taking over any insurance which may exist on the [69] aforementioned real property.

3. That the trustee transfer title to the aforementioned real property free and clear of that certain lien and Deed of Trust held by Bill Lepper Motors, Inc., dated April 14, 1947, recorded May 2, 1947, in Book 24521, page 242 of Official Records of Los Angeles County, State of California, wherein Title Insurance and Trust Company is the trustee and said Bill Lepper Motors, Inc., is the beneficiary by reason of an assignment made by the original beneficiary, to wit: Reconstruction Finance Corporation; and further that title to said real property be transferred to the purchaser free and clear of any other liens or encumbrances which may exist against said real property.

4. That the proceeds of the sale of the aforementioned real property to Hugo E. Aleidis, or his nominee, are, after the payment of or satisfaction of such tax liens as may exist against said real property, to be delivered and paid to the trustee herein, subject to the further order of this court. That such liens as may be possessed by Bill Lepper Motors, Inc., or the Title Insurance and Trust Company, be and the same are hereby transferred to the proceeds which are to come into the possession of the trustee from the sale of the aforementioned real property. That thereafter the trustee herein may, by appropriate proceedings, obtain the determination by this court of the validity, priority and

extent of any lien claimed by Bill Lepper Motors, Inc., and Title Insurance and Trust Company, and may present for determination any defenses or grounds which he may possess concerning said lien. That the court herein expressly reserves jurisdiction to determine any and all of said matters.

5. That the aforementioned sale by the trustee to Hugo E. Aleidis, or his nominee, is made upon the express condition and with the understanding that the trustee herein does not warrant or guarantee the validity or efficacy of any leases or [70] leasehold interests which may exist on said real property by the occupants thereof and any other persons.

6. That the aforementioned sale by the trustee to Hugo E. Aleidis, or his nominee, is made upon the express condition and with the understanding that the trustee herein does not warrant or guarantee to the purchaser, or any other person, title to one large furnace located on said property and one crane system located on said property.

7. That upon the close of escrow covering the sale of the aforementioned real property to Hugo E. Aleidis, or his nominee, the said Hugo E. Aleidis, or his nominee, shall thereafter be entitled to collect whatever rents may thereafter become due from the occupants of the aforementiond real property.

Dated: This 27th day of July, 1951.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed July 27, 1951. Referee. [71]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE AGAINST INDUSTRIAL ASSOCIATES, CALIFORNIA BY-PRODUCTS CORPORATION, BILL LEPPER MOTORS, INC., AND CONSOLIDATED CASTING CO. RE RENTALS

To the Honorable Reuben G. Hunt, Referee in Bankruptcy:

The petition of Frank M. Chichester respectfully alleges:

1. That he is the duly qualified and appointed trustee acting herein.

2. That among the assets of the above-entitled estate there is a certain parcel of real property located at 1601 El Segundo Boulevard, El Segundo, California, which said real property was, on July 10th, sold at public sale and which said sale is now in the process of being completed through an escrow being held at the Title Insurance and Trust Company.

3. That a portion of said real property has been for some time past occupied by a business known as Industrial Associates. That your petitioner is informed and believes, and therefore alleges that the said Industrial Associates occupies the said premises by virtue of a lease entered into with the bankrupt at a [72] monthly rental of $660.00 per month. That for some time past the said Industrial Associates

has refused to pay their monthly rental to the trustee or any other person for the reason that claims to said rental have been asserted by Bill Lepper Motors Inc., and claimed by California By Products Corporation. That your trustee is entitled to receive from said Industrial Associates any and all rentals which have accrued from said Industrial Associates and are unpaid.

4. That another occupant of a portion of the premises aforementioned is Consolidated Casting Co. That the said Consolidated Casting Co. occupies said premises by virtue of a lease arrangement entered into between the said Consolidated Casting Co. and Bill Lepper Motors, Inc., or the bankrupt. That said lease arrangement provides that the said Consolidated Casting Co. pay a monthly rental of $370.00 per month. That to date your trustee has received no rental from the Consolidated Casting Co., although the said Consolidated Casting Co. has been occupying real property owned by the trustee or the bankrupt. That the trustee is informed and believes, and therefore alleges, that the said Consolidated Casting Co. refuses to pay any rental to the trustee for the reason that Bill Lepper Motors, Inc., claim said rentals.

Wherefore, your petitioner prays that an order be issued requiring the said Industrial Associates, Bill Lepper Motors, Inc., Consolidated Casting Co., and California By Products Corporation, and each of them, to be and appear before this court at a time and place to be fixed in said order to show

cause, if any there be, why the following further orders should not be made by this court:

I.

Ordering, adjudging and decreeing that Industrial Associates, Bill Lepper Motors, Inc., California By Products Corporation come forth and set forth (a) the amount of rent due and unpaid from Industrial Associates for occupancy of a portion of the [73] premises located at 1601 El Segundo Boulevard, El Segundo, California, and (b) the respective claims, if any, of Bill Lepper Motors, Inc., and California By Products Corporation, in and to the said accrued and unpaid rentals; and further ordering, adjudging and decreeing that the said Industrial Associates pay over to the trustee herein forthwith any and all rentals due and unpaid to the trustee or bankrupt herein.

II.

Ordering, adjudging and decreeing that Consolidated Casting Co. and Bill Lepper Motors, Inc., come forth and set forth (a) the amount of rent due and unpaid from Consolidated Casting Co. for occupancy of a portion of the premises located at 1601 El Segundo Boulevard, El Segundo, California, and (b) the respective claims, if any, of Bill Lepper Motors, Inc., in and to the said accrued and unpaid rentals; and further ordering, adjudging and decreeing that the said Consolidated Casting Co. pay over to the trustee herein forthwith any and all rentals due and unpaid to the trustee or bankrupt herein.

I.

III.

Granting such other and further relief as may be proper to the court.

/s/ FRANK M. CHICHESTER,
Petitioner.

EHRLICH AND BLONDER,

By /s/ DAVID BLONDER,
Attorneys for Petitioner.

State of California,
County of Los Angeles—ss.

Frank M. Chichester, makes solemn oath that he is the [74] trustee in bankruptcy of the above-named bankrupt and is duly authorized to make the aforesaid petition and this affidavit, and that the statements contained in said petition are true according to the best of his knowledge, information and belief.

/s/ FRANK M. CHICHESTER.

Subscribed and sworn to before me this 30th day of July, 1951.

[Seal] /s/ STELLA LAMAT,
Notary Public in and for Said County and State.

[Endorsed]: Filed July 31, 1951. [75]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE AGAINST CALIFORNIA BY PRODUCTS CORPORATION AND BILL LEPPER MOTORS, INC., RE CERTAIN MACHINERY AND EQUIPMENT

To the Honorable Reuben G. Hunt, Referee in Bankruptcy:

The petition of Frank M. Chichester respectfully alleges:

1. That he is the duly appointed and acting trustee in bankruptcy in the above-entitled matter.

2. That among the assets of the bankrupt, as set forth in the schedules of said bankrupt filed herein, are listed a group of assets of the value of $10,000.00 in the possession of the respondent, California By Products Corporation.

3. That your petitioner is informed and believes that at some time prior to the filing of the bankruptcy petition herein, certain machinery and equipment belonging to the bankrupt was taken into the possession of the respondent, California By Products Corporation, and that said machinery and equipment has since said time, and is at present, in the possession of California By Products Corporation at their place of business 5717 South District Boulevard, Los Angeles, California; that it was the understanding between the bankrupt and said California By Products Corporation that said [76]

machinery and equipment would be held by said California By Products Corporation for and on behalf of the said bankrupt until such time as said machinery and equipment could be sold.

4. That although your petitioner has sought to determine what machinery and equipment was turned over to California By Products Corporation, and what machinery and equipment is at present in the possession of California By Products Corporation which now belongs to the trustee as part of the estate of the bankrupt, your petitioner has been, to date, unable so to do.

5. That your petitioner is informed and believes and therefore alleges that the said California By Products Corporation asserts a claim of lien against such machinery and equipment as may be in their possession, but your petitioner has been unable to determine from the said California By Products Corporation the nature of or extent of such lien, if any.

6. That your petitioner is informed and believes and therefore alleges that on or about April 14, 1947, a certain chattel mortgage was entered into between the bankrupt, as mortgagor and Reconstruction Finance Corporation, as mortgagee which said chattel mortgage covered and became a lien upon certain machinery, equipment, furniture, fixtures and appliances belonging to the bankrupt. That said chattel mortgage was subsequently assigned and transferred to Bill Lepper Motors, Inc. That Bill Lepper Motors, Inc., contends that it

has foreclosed upon the machinery and equipment, furniture, fixtures and appliances covered by said chattel mortgage. That your petitioner has been informed that the machinery and equipment in the possession of California By Products Corporation and belonging to the bankrupt, may have been included in the aforementioned chattel mortgage assigned to Bill Lepper Motors, Inc., and that Bill Lepper Motors, Inc., may have foreclosed upon the aforementioned machinery and equipment now in the possession of California By Products [77] Corporation. That your petitioner has sought to obtain information from the parties hereto which will enable him to determine the rights of the parties hereto to the aforementioned machinery and equipment in the possession of California By Products Corporation, but your petitioner has been unable to obtain such information.

Wherefore, your petitioner prays that an order be issued requiring said California By Products Corporation and Bill Lepper Motors, Inc., to be and appear before this court at a time and place to be fixed in said order to show cause, if any there be, why the following orders should not be made:

I.

Ordering the said California By Products Corporation to come forth and set forth what assets it has in its possession belonging to the bankrupt or the trustee herein.

II.

Ordering the said California By Products Cor-

poration to set forth under what arrangements or agreements with the bankrupt it received possession of the assets of the bankrupt.

III.

Ordering the said California By Products Corporation to set forth what claims or liens, if any, it may have against any property of the bankrupt now in its possession.

IV.

Ordering the said California By Products Corporation to surrender forthwith to the trustee herein any property belonging to the bankrupt, which the said California By Products Corporation now has in its possession.

V.

Ordering Bill Lepper Motors, Inc., to come forth and set forth its claims, if any it has, against the aforementioned machinery and equipment in the possession of California By Products [78] Corporation.

VI.

Granting such other and further relief as to the court may seem proper in the premises.

/s/ FRANK M. CHICHESTER,
Petitioner.

EHRLICH AND BLONDER,

By /s/ DAVID BLONDER,
Attorneys for Petitioner.

[Endorsed]: Filed July 31, 1951. Referee. [79]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE AGAINST BILL LEPPER MOTORS, INC., AND CONSOLIDATED CASTING CO. RE: CHATTEL MORTGAGE

To the Honorable Reuben G. Hunt, Referee in Bankruptcy:

The petition of Frank M. Chichester respectfully alleges:

1. That he is the duly appointed, acting and qualified trustee herein.

2. That on or about April 14, 1947, a certain chattel mortgage was executed by the bankrupt as mortgagor, in favor of Reconstruction Finance Corporation as mortgagee, which said chattel mortgage covered and became a lien upon certain machinery and equipment, furniture, fixtures and appliances, belonging to the bankrupt, which said items of property were more particularly set forth in an exhibit attached to said chattel mortgage; that said chattel mortgage was security, in conjunction with a certain Deed of Trust executed by the bankrupt on real property, for the payment of an indebtedness in the principal sum of $100,000.00. That said chattel mortgage was, at some time, subsequent to its execution, assigned and transferred to Bill Lepper Motors, Inc.

3. That your petitioner is informed and believes and [80] therefore alleges that at some time in 1950

the said Bill Lepper Motors, Inc., attempted to and purportedly did foreclose, under the terms of the aforementioned chattel mortgage, upon the machinery, equipment, furniture, fixtures and appliances at that time belonging to the bankrupt; and that at said foreclosure sale said personal property was purchased by the respondent Consolidated Casting Co., for the sum of $1,500.00.

4. That your petitioner has attempted to obtain the information from the respondent herein concerning the procedure and legal steps, if any, taken to effectuate the aforementioned foreclosure sale, but your petitioner has been unable to obtain such information from the parties hereto. That your petitioner is informed and believes and therefore alleges that the foreclosure procedure and steps taken by the respondent Bill Lepper Motors, Inc., were not proper and in accordance with law, and that therefore, said foreclosure was of no effect whatsoever; and that the property purportedly purchased by Consolidated Casting Co. at said foreclosure sale, belongs to the bankrupt and the trustee herein and is part of this bankrupt estate.

Wherefore, your petitioner prays that an order be issued requesting Bill Lepper Motors, Inc., and Consolidated Casting Co. to be and appear before this court at a time and place fixed in said order to show cause, if any there be, why the following orders should not be made:

I.

Ordering the said Bill Lepper Motors, Inc., and

Consolidated Casting Co. to present and disclose to this court all the evidence and facts showing what steps, if any, were taken to foreclose upon the aforementioned property and what steps, if any, were taken to conduct the foreclosure sale of the aforementioned property.

II.

Ordering the said Bill Lepper Motors, Inc., and Consolidated Casting Co. to come forth and set forth what claims, if any they have, against the aforementioned property. [81]

III.

Ordering, adjudging and decreeing that the aforementioned chattel mortgage foreclosure proceedings and sale were ineffective, null and void, and that the property covering by said chattel mortgage belongs to the bankrupt or the trustee herein and is part of said bankrupt estate.

IV.

Granting such other and further relief as to the court may seem proper in the premises.

/s/ FRANK M. CHICHESTER,
Petitioner.

EHRLICH AND BLONDER,
By /s/ DAVID BLONDER,
Attorneys for Petitioners.

State of California,
County of Los Angeles—ss.

Frank M. Chichester, makes solemn oath that he is the trustee in bankruptcy of the above-named bankrupt and is duly authorized to make the aforesaid petition and this affidavit, and that the statements contained in said petition are true according to the best of his knowledge, information and belief.

/s/ FRANK M. CHICHESTER.

Subscribed and sworn to before me this 30th day of July, 1951.

[Seal] /s/ STELLA LAMAT,
Notary Public in and for Said County and State.

[Endorsed]: Filed July 31, 1951, Referee. [82]

[Title of District Court and Cause.]

ANSWER IN OPPOSITION TO PETITION FOR ORDER AND ORDER TO SHOW CAUSE AGAINST CALIFORNIA BY-PRODUCTS CORPORATION AND BILL LEPPER MOTORS, INC., RE CERTAIN MACHINERY AND EQUIPMENT

Comes now California By-Products Corporation, and in answer to the petition of Frank M. Chichester, Trustee, admits, denies and alleges as follows:

I.

In answer to paragraph II, denies generally and specifically each and every allegation contained in said paragraph, and denies that there is in the possession of California By-Products Corporation any assets belonging to the bankrupt.

II.

Answering paragraph III, denies generally and specifically each and every allegation contained in said paragraph.

III.

Answering paragraph IV, denies generally and specifically each and every allegation contained in said paragraph, and alleges that the Trustee has not only not attempted to [83] determine what machinery and equipment were turned over to California By-Products Corporation but has refused on his own behalf an invitation to examine the premises to determine whether in truth and reality California By-Products Corporation has any assets belonging to the bankrupt, and further alleges that the Trustee has no information or belief as to any actual machinery or equipment belonging to the bankrupt in the hands of California By-Products Corporation.

IV.

In answer to paragraph V of the petition, denies generally and specifically each and every allegation contained in said paragraph, and denies specifically that there is any machinery or equipment in its possession belonging to the bankrupt.

V.

In answer to paragraph VI of the petition, California By-Products Corporation has no information or belief, and based upon said lack of information or belief, denies generally and specifically each and every allegation contained in said paragraph.

As a Second, Separate and Distinct Defense, California By-Products Corporation, a California Corporation, Alleges as Follows:

I.

That on or about the 5th day of December, 1949, it was approached by the president of the bankrupt, Frank D. Anderson, and was told that a portion of the premises of the bankrupt was being rented and that the bankrupt wanted to dispose of certain scrap and odds and ends which it could not use and asked if California By-Products Corporation would be interested in purchasing the same. Mack Cottler, the president of California By-Products Corporation, replied that it was not, as it did not deal in ferrous metals and that it would take some time to wreck, [84] move and dispose of the scrap mentioned by Mr. Anderson; that Mr. Anderson then stated he must remove the scrap and other items from the premises so that Industrial Associates could move in and that if California By-Products Corporation would give permission to the bankrupt to move the above-mentioned items to the premises of California By-Products Corporation that those items which the bankrupt did not sell within a period

of sixty days would become the sole and exclusive property of California By-Products Corporation for its trouble in accommodating the bankrupt in said matter.

II.

That in pursuance of said agreement, the bankrupt using its own trucks moved the above mentioned items to the premises of California By-Products Corporation, and within the next sixty-day period sold the items of value to Joseph Levin & Sons and to Afton Iron Mine, the proceeds of the sale of which were collected directly by the bankrupt; that also during said period the bankrupt picked up certain items that were on the premises, saying that they would use them after all; and that on or about the 1st day of March, 1950, Frank D. Anderson, the then president of the bankrupt, told Mack Cottler, the president of California By-Products Corporation, that he had removed and sold all of the merchandise of value and that the remainder now belonged to California By-Products Corporation for its trouble. That the reasonable storage charges during the period during which the above-mentioned items were on the premises of California By-Products Corporation would have been the sum of $90.00 per month.

Wherefore, California By-Products Corporation prays:

1. That Frank M. Chichester, Trustee, and/or Bill Lepper Motors, Inc., take nothing by the petition on file;

2. That an order be issued, decreeing that California By-Products Corporation has in its possession no machinery, [85] merchandise, equipment and/or any items whatever belonging to the bankrupt; and

3. For such other and further relief as to the court may seem fit and proper in the premises.

/s/ DANIEL W. GAGE,
Attorney for California
By-Products Corporation.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 8, 1951, Referee. [86]

[Title of District Court and Cause.]

ANSWER IN OPPOSITION TO PETITION FOR ORDER AND ORDER TO SHOW CAUSE AGAINST INDUSTRIAL ASSOCIATES, CALIFORNIA BY-PRODUCTS CORPORATION, BILL LEPPER MOTORS, INC., AND CONSOLIDATED CASTING CO. RE RENTALS

Comes now California By-Products Corporation, and in answer to the petition of Frank M. Chichester, Trustee, admits, denies and alleges as follows:

I.

In answer to paragraph III of said petition, denies that the Trustee and/or Bill Lepper Motors,

Inc., is entitled to receive from Industrial Associates any or any part of the rentals which have accrued from said Industrial Associates and are unpaid.

II.

In answer to paragraph IV of said petition, California By-Products Corporation has no information or belief, and based upon said lack of information and belief, denies generally and specifically each and every allegation contained in said [88] paragraph.

As a Second, Separate and Distinct Defense, California By-Products Corporation, a California Corporation, Alleges as Follows:

I.

That on or about July 11, 1950, the bankrupt and California By-Products Corporation entered into an agreement in writing whereby, among other things, California By-Products Corporation agreed to sell and deliver to the bankrupt certain aluminum scrap and ingot in the amount of some $4,500.00, and whereby, as security for the merchandise theretofore delivered and to be delivered, the bankrupt agreed to make an assignment of all rents due and to become due under that certain indenture of lease executed at Inglewood, California, on the 6th day of January, 1950, between the bankrupt and Industrial Associates, the assignment to remain in full force and effect until all the moneys above-mentioned had been repaid to California By-Products Corporation.

II.

That in pursuance of said agreement, an assignment was made on the 11th day of July, 1950, said assignment being executed by the bankrupt by its president, Frank D. Anderson, and notice of assignment executed by California By-Products Corporation by Mack Cottler, its president. A copy of said assignment and notice of assignment is attached hereto marked Exhibit "A," incorporated herein and made a part hereof by reference.

III.

That in pursuance of Sections 3017 to 3029, inclusive, of the Civil Code of the State of California, notice of assignment of account or accounts from the bankrupt to California By-Products Corporation, covering rents due and to become due under the above-mentioned lease, was recorded in the office of the County Recorder on the 14th day of July, 1950, as [89] Instrument No. RF11164-X, a copy being set forth as Exhibit "B."

IV.

That notice of said assignment in the form and manner set forth in Exhibit "A," attached hereto, incorporated herein and made a part hereof by reference, was sent to Industrial Associates, at 1601 El Segundo Boulevard, El Segundo, California, on or about the 14th day of July, 1950.

V.

That in pursuance of said agreement of July 11, 1950, and the subsequent assignment above referred

to, the bankrupt is presently indebted to California By-Products Corporation in the amount of $16,-244.07 (under said agreement and under previous shipments). That in pursuance of the above-mentioned assignment, Industrial Associates commenced in September, 1950, paying the rent under the lease to California By-Products Corporation, until October, 1950.

VI.

That on or about October 19, 1950, Industrial Associates received a letter from Bill Lepper Motors, Inc., to the effect that Bill Lepper Motors, Inc., was now holder of note secured by first deed of trust on the premises, and that all rentals should be paid to Bill Lepper Motors, Inc. A copy of said letter was sent to California By-Products Corporation and was referred to the attorney of California By-Products Corporation for answer.

On October 26, 1950, the original of the letter, as set forth in Exhibit "C," attached hereto, incorporated herein, and made a part hereof by reference, was sent to Industrial Associates, wherein they were again advised that California By-Products Corporation held assignment of rents due and to become due.

That on or about the 3rd day of November, [90] 1950, California By-Products Corporation received the rent check from Industrial Associates covering the period October 20, 1950, to November 20, 1950.

That thereafter Bill Lepper Motors, Inc., again made demand upon Industrial Associates that the rents be paid to it, as it had now become the mort-

gagee in possession; and California By-Products Corporation made demand upon Industrial Associates for payment of rents to it, as a valid assignee of the rents due and to become due.

That Industrial Associates has refused to pay rents to either party until forced so to do legally.

Wherefore, California By-Products Corporation prays:

1. That the Trustee, Frank M. Chichester, Industrial Associates, Bill Lepper Motors, Inc., and Consolidated Casting Co. take nothing by the petition on file;

2. That an order be made ordering, adjudging and decreeing that Industrial Associates be ordered to pay forthwith to California By-Products Corporation the amount of rent due and unpaid from it for occupancy of the portion of the premises of the bankrupt located at 1601 El Segundo Boulevard, El Segundo, California;

3. That the respective claims, if any, of the Trustee and Bill Lepper Motors, Inc., in and to the said accrued and unpaid rentals be dissolved; and

4. For such other and further relief as may seem meet and proper to the court.

/s/ DANIEL W. GAGE,
Attorney for California [91]
By-Products Corporation.

EXHIBIT A

Assignment

For Value Received, the undersigned, Superior Casting Company, Inc., a California corporation, herein referred to as "Assignor," hereby assigns, transfers and sets over unto California By-Products Corporation, a California corporation, herein referred to as "Assignee," all moneys now due or hereafter to become due from Industrial Associates, Inc., a California corporation, under that certain indenture of lease executed at Inglewood, California, the 6th day of January, 1950, between Superior Casting Company, Inc., as Lessor, and Industrial Associates, Inc., as Lessee, said lease being for a period of five (5) years, commencing the 20th day of January, 1950, ending at midnight on the 19th day of January, 1955, and being for a total amount of Thirty-nine Thousand Three Hundred Dollars ($39,300.00), to be paid off after the initial payment of Two Thousand Six Hundred Twenty Dollars ($2,620.00) at the rate of Six Hundred Fifty-five Dollars ($655.00) per month, commencing on the 20th day of February, 1950, and continuing until the full amount has been paid; and any and all amendments thereof and supplements thereto as collateral security to said Assignee for any and all indebtedness of the Assignor to said Assignee now existing or hereafter arising in the amount of Forty-five Hundred Dollars ($4,500.00), and as evidenced by that certain agreement between Superior Casting Company, Inc., and California By-Products Corpo-

ration, calling for the payment of $4,500.00 to the said California By-Products Corporation by Superior Casting Company, Inc., for merchandise sold or to be sold to the said Superior Casting Company, Inc., by California By-Products Corporation. [92]

Assignor hereby constitutes and appoints the said California By-Products Corporation the true and lawful attorney, irrevocable, of Assignor, to demand, receive, and enforce payments, and to give receipts, releases and satisfactions, either in the name of Assignor or in the name of California By-Products Corporation, in the same manner and with the same effect as Assignor could do if this assignment had not been made.

In Witness Whereof, Assignor has executed these presents this 11th day of July, 1950.

SUPERIOR CASTING
COMPANY, INC.

By /s/ FRANK D. ANDERSON,
President.

Notice of Assignment

Industrial Associates, Inc.
1601 El Segundo Boulevard
El Segundo, California

Please Take Notice that moneys due or to become due under that certain indenture of lease above described to the extent of Forty-five Hundred Dollars ($4,500.00) have been assigned to California By-Products Corporation. Payments due or to become

due under the same are to be made direct to California By-Products Corporation, at 5717 South District Boulevard, Los Angeles, California.

Please return to us one copy of this Notice, with the Receipt and Consent below set forth, dated and signed by you.

Very truly yours,

CALIFORNIA BY-PRODUCTS CORPORATION,

By /s/ MACK COTTLER,
President. [93]

EXHIBIT B

Notice of Assignment of an Account or Accounts

Notice Is Hereby Given by Superior Casting Company, Inc., a California corporation, herein designated the "Assignor," whose chief place of business within the State of California is 1601 El Segundo Boulevard, El Segundo, California, and by California By-Products Corporation, a California corporation, herein designated the "Assignee," whose chief place of business within the State of California is 5717 South District Boulevard, Los Angeles, California, that the said Assignor expects to assign the rents due or to become due from Industrial Associates, Inc., under that certain indenture of lease executed at Inglewood, California, the 6th day of January, 1950, between Superior Casting Company, Inc., as Lessor, and Industrial Associates, Inc., as Lessee.

That the assignment is made as collateral security

for the payment to the Assignee of the sum of $4,500.00 for scrap aluminum and ingots to be sold by the Assignee to the Assignor as per that certain agreement of July 11, 1950.

This Notice is given pursuant to Sections 3017 to 3029, inclusive, of the Civil Code of the State of California.

SUPERIOR CASTING
COMPANY, INC.

By /s/ FRANK D. ANDERSON,
President;
Assignor.

CALIFORNIA BY-PRODUCTS
CORPORATION,

By /s/ MACK COTTLER,
President;
Assignee.

To County Recorder:
Please return to:
Daniel W. Gage, Attorney at Law
740 Rowan Building
458 South Spring Street
Los Angeles 13, California [94]

EXHIBIT C

October 26, 1950.

Industrial Associates, Inc.
1601 East El Segundo Boulevard
El Segundo, California

Gentlemen:

I am in receipt of your letter of October 20, 1950,

and your copy of letter of October 19, 1950, from Bill Lepper Motors relative to your lease with Superior Casting Company, Inc.

This is to advise you that California By-Products Corporation holds a bona fide assignment of rents due and to become due under lease agreement of January 6, 1950, copy of which assignment is in your possession.

Notice of said assignment was recorded with the County Recorder on the 14th day of July, 1950, Instrument No. RF11164-X.

Under said notice and the assignment accepted by you, demand is hereby made upon you for all rents now due and to become due under your lease of January 6, 1950. You are further notified that should you make payments to other than California By-Products Corporation you will be held responsible for same.

Yours very truly,

/s/ DANIEL W. GAGE,
Attorney at Law.

DWG L

cc: California By-Products Corporation
5717 South District Boulevard
Los Angeles 22, California

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed August 8, 1951, Referee. [95]

[Title of District Court and Cause.]

ANSWER TO TRUSTEE'S PETITION RE CHATTEL MORTGAGE

Comes now Bill Lepper Motors, Inc., a California corporation, and for itself answers the trustee's petition re chattel mortgage by admitting, denying and alleging as follows:

I.

Answering Paragraph 4 of said petition, said respondent denies each and every allegation contained therein; and further answering said Paragraph, said respondent alleges that the foreclosure sale of the personal property under said chattel mortgage was conducted in all respects in accordance with the law.

/s/ ROBERT H. SHUTAN,
Attorney for Respondent
Bill Lepper Motors, Inc.

Duly verified. [97]

[Endorsed]: Filed August 17, 1951, Referee.

[Title of District Court and Cause.]

ANSWER OF BILL LEPPER MOTORS, INC. TO TRUSTEE'S PETITION RE RENTALS

Comes now Bill Lepper Motors, Inc., a California corporation, and for itself answers the trustee's petition re rights to certain rentals by admitting, denying and alleging as follows:

I.

Admits that this respondent claims the right to the rentals by Industrial Associates; and alleges that Industrial Associates is obligated to pay its rentals to said respondent, Bill Lepper Motors, Inc., by virtue of the obligation of said Industrial Associates under its lease with Superior Casting Company, Inc., and by virtue of the fact that said Bill Lepper Motors, Inc., has succeeded to the rights of said Superior Casting Company, Inc., by virtue of the terms and provisions of that certain deed of trust dated April 14, 1947, between Superior Casting Company, Inc., and Reconstruction Finance Corporation, which deed of trust was duly and validly assigned by said Reconstruction Finance Corporation to Bill Lepper Motors, Inc., for valuable consideration. That by virtue of default in said deed of trust, said Bill Lepper Motors, Inc., [99] under the power and authority granted in the said deed of trust, entered into possession of the properties herein involved in November, 1950, and succeeded to the rights of the lessor; that Industrial Associates has paid no rent to Bill Lepper Motors, Inc., although such payment of rent was duly demanded.

II.

That said respondent, Bill Lepper Motors, Inc., admits that it claims the right to receive rentals from Consolidated Casting Company; that said claim is based upon a lease executed by said Bill Lepper Motors, Inc., as beneficiary in possession under said deed of trust, lessor, and Consolidated

Casting Company, lessee; that said rent is in the amount of $370.00 per month. That since the execution of this lease between said respondent and Consolidated Casting Company, Bill Lepper Motors, Inc., has received from Consolidated Casting Company under said lease rentals from November, 1950, to June, 1951, in the total sum of $2,960.00, the last rental received being for the month of June, 1951.

III.

That said Bill Lepper Motors, Inc., admits that its claims for rentals and rights to rentals from the property herein involved is based upon its right to security for and payment of the obligation evidenced by the above-described deed of trust; and said Bill Lepper Motors, Inc., hereby states that it does not claim any rights other than those to which it is entitled under said deed of trust and the promissory note secured thereby.

/s/ ROBERT H. SHUTAN,
Attorney for Respondent
Bill Lepper Motors, Inc.

Duly verified. [100]

[Endorsed]: Filed August 17, 1951, Referee.

[Title of District Court and Cause.]

PETITION FOR ORDER DIRECTING TRUSTEE TO PAY MONEY

To The Honorable Reuben G. Hunt, Referee in Bankruptcy:

The petition of Bill Lepper Motors, Inc., a California corporation, respectfully shows and alleges:

1. That heretofore, on the 27th day of July, 1951, this Court made its order confirming sale of real property, which property is more fully described in said order, and which description is hereby referred to and made a part hereof.

2. That your petitioner is the holder, owner and beneficiary of a deed of trust on the above-described real property and improvements, which deed of trust is dated April 14, 1947, and executed by Superior Casting Company, Inc., and recorded May 2, 1947, in Book 24521, Page 242, Official Records of Los Angeles County.

That on or about the 4th day of April, 1951, your petitioner filed with this Court its Petition for leave to proceed with foreclosure sale of trust deed, which petition is of record in this proceeding, and is hereby referred to; that said petition set forth, inter alia, a default by the bankrupt under the terms of said deed of [102] trust. That after several hearings on the Order to show cause based upon said petition, this Court caused the matter to be placed "off calendar" for the purpose of permitting the

trustee in bankruptcy to hold a sale of said property.

3. That the net amount due and owing to your petitioner from the bankrupt, secured by said deed of trust, is the amount of $64,944.07. That the basis for such figure is set forth in some detail in Exhibit "A" attached hereto and made a part hereof.

4. That the sale of the above-described property by the trustee in bankruptcy herein, has now been consummated, and the trustee has received from the escrow of such sale a sum in excess of the amount due and owing to your petitioner on its first deed of trust.

5. That your petitioner has made demand upon Frank M. Chichester, said trustee in bankruptcy, for the payment of said sum owing under said deed of trust, and said trustee has refused such demand.

6. That Russell B. Seymour and Daniel W. Gage, attorneys at law, who represent creditors in this matter, have stated generally that they oppose payment by the trustee to your petitioner of the amount claimed due under its deed of trust, or any amount.

Wherefore, your petitioner prays that an order be issued by this Court requiring Frank M. Chichester as trustee in bankruptcy of this estate, Russell B. Seymour, Daniel W. Gage, California By-Products, E. S. Haven, Armand J. Pihlblad, and Sonnett Supply Company to be and appear before this Court at a time and place to be fixed in said order

to show cause, if any there be, why this Court should not make its Order directing that the trustee in bankruptcy herein pay over to your petitioner, Bill Lepper Motors, Inc., forthwith the sum of $64,944.07 cash.

/s/ ROBERT H. SHUTAN,
Attorney for Bill Lepper
Motors, Inc., Petitioner.

EXHIBIT A

To Reconstruction Finance Company	$60,600.00	
Los Angeles County Taxes	2,657.08	
Legal services as of December, 1950	743.00	
Ventilators for building	618.00	
Insurance	791.20	
Interest (detailed breakdown will be shown upon request)	2,144.79	
Attorneys fees in enforcing beneficiary's rights under this trust deed	2,500.00	
Total	$70,054.07	$70,054.07
Receipts:		
Rent received from Consolidated Casting Co.	$ 2,960.00	
Receipt from sale of 1946 Oldsmobile	650.00	
Receipt from sale of personal property	1,500.00	
	$ 5,110.00	5,110.00
		$64,944.07

Duly verified. [104]

[Endorsed]: Filed September 11, 1951, Referee.

[Title of District Court and Cause.]

ANSWER OF FRANK M. CHICHESTER, TRUSTEE, IN OPPOSITION OF PETITION OF BILL LEPPER MOTORS, INC., FOR ORDER DIRECTING TRUSTEE TO PAY MONIES

Comes now the respondent, Frank M. Chichester, the duly qualified and acting Trustee in the above-entitled matter and appearing for himself alone, in answer to and in opposition to the petition of Bill Lepper Motors, Inc., a corporation, on file herein, does admit, deny and allege as follows:

I.

Answering the allegations contained in paragraphs 2 and 3 of the Petition on file herein, said respondent denies generally and specifically each and every allegation contained therein and the whole thereof.

For a First, Separate and Distinct Affirmative Defense to the Petition on File Herein, Respondent Does Allege as Follows:

I.

That on July 10, 1951, in the Courtroom of the Honorable Reuben G. Hunt, Referee in Bankruptcy, respondent, as trustee herein, did offer to sell, at public sale, the real property mentioned in the Petition of Bill Lepper Motors, Inc., on file herein, which [106] said real property is more fully de-

scribed in that certain Order of this Court, confirming the sale of said real property, dated July 27th, 1951. That at the time said real property was offered for sale the court, at the request of respondent herein, ordered Bill Lepper Motors, Inc., to announce in open court the amount which it claimed under a purported lien of a purported Trust Deed, which it held on said real property; that it was then and there announced that respondent herein could not intelligently accept bids for said real property until he knew the amount claimed by Bill Lepper Motors, Inc., out of any offered bid to satisfy the purported lien of the said purported Trust Deed of Bill Lepper Motors, Inc.; and your respondent stated further that he could not accept any future bids for said real property which was not high enough to cover the amount claimed by Bill Lepper Motors, Inc., plus taxes, plus administration expenses. That thereupon Bill Lepper Motors, Inc., announced in open court, that the amount due to it to fully satisfy its purported lien, as aforesaid, and which it would accept in full settlement of its purported lien under said purported Trust Deed was the sum of $62,299.00, only.

II.

That thereupon your respondent stated that after estimating the taxes that he would be required to pay in order to sell the aforementioned real property free and clear, and after estimating administration expenses in this estate, and assuming that he might be required to pay said sum of $62,299.00

to Bill Lepper Motors, Inc., that respondent could not sell said real property free and clear for less than the sum of $75,000.00. That thereafter, one Hugo E. Aleidis did bid $75,000.00 for said property free and clear; and relying upon the statement of Bill Lepper Motors, Inc., as aforesaid, that it would claim only the sum of $62,299.00 to satisfy the purported Trust Deed lien of said Bill Lepper Motors, Inc., your respondent recommended to the court that it confirm the sale of said real property, and relying upon said recommendation and the representations of Bill [107] Lepper Motors, Inc., as aforesaid, the court did confirm the sale of said real property for the sum of $75,000.00 by appropriate order dated July 27th, 1951.

III.

That after the trustee and the aforementioned purchaser of said real property, Hugo E. Aleidis, entered into and opened an escrow with the Title Insurance and Trust Company for the purpose of consummating the aforementioned sale of real property, the trustee was informed that in order to clear the title to said real property, said Title Insurance and Trust Company would require Bill Lepper Motors, Inc., or someone on its behalf, to pay to said Title Insurance and Trust Company the sum of $589.22 which said sum was demanded by said Title Insurance and Trust Company as payment for fees incurred by it in performing certain work upon the foreclosure proceedings which had previously been commenced by the said Bill Lepper Motors, Inc., upon the aforementioned purported Trust Deed.

That since Bill Lepper Motors, Inc., refused to pay said sum of $589.22 to the Title Insurance and Trust Company, as demanded by them, and since the trustee found that it was necessary that said sum of $589.22 be paid before a title clearance could be obtained on the aforementioned sale of real property, your trustee did pay to the Title Insurance and Trust Company on behalf of Bill Lepper Motors, Inc., the sum of $589.22 for the purpose and upon the conditions as aforesaid.

IV.

That Bill Lepper Motors, Inc., by virtue of the foregoing facts is estopped from claiming more than the sum of $62,299.00 from respondent, if it is determined that the claim of the said Bill Lepper Motors, Inc., and its lien are valid, and can be established. That furthermore, if Bill Lepper Motors, Inc., does establish its claim for $62,299.00, said claim should be reduced by the sum of $589.22, which sum your respondent was compelled to [108] pay on behalf of and for the benefit of Bill Lepper Motors, Inc., as aforesaid.

For a Second, Separate and Distinct Affirmative Defense to the Petition on File Herein, Respondent Does Allege as Follows:

I.

That on or about April 14, 1947, a certain chattel mortgage was executed by the bankrupt as mortgagor, in favor of Reconstruction Finance Corpora-

tion, as mortgagee, which said chattel mortgage covered and became a lien upon certain machinery and equipment, furniture, fixtures and appliances, belonging to the bankrupt, which said items of property were more particularly set forth in an exhibit attached to said chattel mortgage; that said chattel mortgage was security, in conjunction with a certain Deed of Trust executed by the bankrupt on real property, for the payment of an indebtedness in the principal sum of $100,000.00. That said chattel mortgage was, at some time subsequent to its execution, assigned and transferred to Bill Lepper Motors, Inc.

II.

That your respondent is informed and believes and therefore alleges that at some time in 1950 the said Bill Lepper Motors, Inc., attempted to and purportedly did foreclose, under the terms of the aforementioned chattel mortgage, upon the machinery, equipment, furniture, fixtures and appliances at that time belonging to the bankrupt; and that at said foreclosure sale said personal property was purchased by Consolidated Casting Co. for the sum of $1,500.00.

III.

That your respondent is informed and believes and therefore alleges that the foreclosure procedure and steps taken by Bill Lepper Motors, Inc., were not proper and in accordance with law and therefore said foreclosure was of no effect whatsoever; and [109] that the said Bill Lepper Motors, Inc., and Consolidated Casting Co., did, in effect, convert

to their own use, said property purportedly purchased by Consolidated Casting Co. at said foreclosure sale; that said property belongs to the bankrupt and the trustee herein, and is part of this bankrupt estate; that said property which was purchased at said foreclosure sale by Consolidated Casting Co., was of the value of $20,000.00.

For a Third, Separate and Distinct Affirmative Defense to the Petition on File Herein, Respondent Does Allege as Follows:

I.

That the aforementioned Hugo E. Aleidis, when he did purchase from the trustee herein for the sum of $75,000.00, the aforementioned real property mentioned in the petition of Bill Lepper Motors, Inc., was at the time of said purchase, and at all times herein mentioned, the agent of and acting on behalf of Bill Lepper Motors, Inc., the holders of the purported Trust Deed lien on said real property; and that when Hugo E. Aleidis took title to said real property, he, in effect, received title in the name of and on behalf of Bill Lepper Motors, Inc.

For a Fourth, Separate and Distinct Affirmative Defense to the Petition on File Herein, Respondent Does Allege as Follows:

I.

That prior to the time of the aforementioned purported chattel mortgage foreclosure sale, Bill Lepper Motors, Inc., took possession of the real prop-

erty and business of the bankrupt under its purported rights under the aforementioned purported Trust Deed and that at the time that Bill Lepper Motors, Inc., took possession, as aforesaid, there was located on said real property certain personal property, consisting of fluxes, oils, office furniture, equipment and other property of the estimated reasonable value of $5,000.00, which said property was not subject to the alleged lien [110] of Bill Lepper Motors, Inc., and that all of said property was converted by the said Bill Lepper Motors, Inc., to its own use.

For a Fifth, Separate and Distinct Affirmative Defense to the Petition on File Herein, Respondent Does Allege as Follows:

I.

That said Bill Lepper Motors, Inc., acquired the obligation secured by said Deed of Trust and chattel mortgage from the Reconstruction Finance Corporation by arrangements made with the bankrupt for the purpose of taking over all of the assets of the bankrupt to the exclusion of creditors of the bankrupt. That the bankrupt was then insolvent. That the said Bill Lepper Motors, Inc., without any consideration passing to the bankrupt or its creditors, entered upon the said premises, took over all assets of the bankrupt including property not subject to the lien of said Reconstruction Finance Corporation obligation, secured to itself existing customers of the bankrupt and transferred said business to said Con-

solidated Casting Co. who since about November 1, 1950, has been operating said business at a substantial profit, the exact amount thereof being unknown to the petitioner. That said Consolidated Casting Co. at all times has been and now is an agent and alter ego of said Bill Lepper Motors, Inc.

For a Sixth, Separate and Distinct Affirmative Defense to the Petition on File Herein, Respondent Does Allege as Follows:

I.

That at the time the said Bill Lepper Motors, Inc., acquired the aforementioned purported Deed of Trust and the obligation which it secured, from Reconstruction Finance Corporation, the said Bill Lepper Motors, Inc., was acting as the agent for and on behalf of the bankrupt, Superior Casting Company, Inc.

Wherefore, respondent prays: [111]

1. That petitioner, Bill Lepper Motors, Inc., take nothing by its petition;

2. That an order be made adjudging and decreeing that the Trust Deed upon which Bill Lepper Motors, Inc., asserts its claim is null and void and of no effect;

3. That an order be made adjudging and decreeing that Bill Lepper Motors, Inc., is indebted to the bankrupt estate in an amount equal to the personal property converted by it as a result of the aforementioned chattel mortgage foreclosure sale;

4. That an order be made adjudging and decreeing and setting forth the respective rights of the parties hereto to the funds in the hands of the trustee, received by the trustee, as the purchase price for the real property mentioned in the Petition of Bill Lepper Motors, Inc., on file herein;

5. For such other and further relief as to the court may seem proper in the premises.

EHRLICH AND BLONDER,

By /s/ DAVID BLONDER,
Attorneys for Frank M.
Chichester, Trustee.

Duly verified.

Affidavit of service by mail attached. [112]

[Endorsed]: Filed September 25, 1951, Referee.

[Title of District Court and Cause.]

MOTION TO DISMISS

Under Rule 12, Federal Rules of Civil Procedure

Come now Daniel W. Gage, on behalf of himself and as attorney for California By-Products Corporation, and Russell B. Seymour, on behalf of himself and as attorney for E. S. Haven, Armand J. Pihlblad and Sonnett Supply Company, and move that the petition for order directing trustee to pay money, filed herein, by Bill Lepper Motors, Inc., be dismissed under the provision of Rule 12

(b) (6) of the Federal Rules of Civil Procedure, on the ground that said petition fails to state a claim upon which relief can be granted against any of the parties now appearing.

Dated the 25th day of September, 1951.

/s/ DANIEL W. GAGE,
Respondent and as Attorney for California By-Products Corporation.

/s/ RUSSELL B. SEYMOUR,
Respondent and as Attorney for E. S. Haven, Armand J. Pihlblad and Sonnett Supply Company.

Affidavit of Service by Mail attached.

[Endoresd]: Filed September 26, 1951, [114] Referee.

[Title of District Court and Cause.]

PETITION

To the Hon. Reuben G. Hunt, Referee in Bankruptcy in the Above Matter:

Come now Russell B. Seymour and Daniel W. Gage, and respectfully call to the attention of the court the following matters:

That Daniel W. Gage is a creditor of the above-named bankrupt and is attorney for California By-Products Corporation, a creditor with a substantial claim, filed herein; that Russell B. Seymour

is attorney for E. S. Haven, Armand J. Pihlblad and Sonnett Supply Company, each of which has a claim against the bankrupt; that Russell B. Seymour, pursuant to order of this court, was attorney for Leslie S. Bowden, the receiver herein.

At various times, examinations under section 21(a) and otherwise under the provisions of the Bankruptcy Act have been had, the same being conducted partially by Russell B. Seymour and the remainder by David Blonder, attorney for Frank M. Chichester, [116] trustee herein; that the election of Frank M. Chichester as trustee was the result of various claims voted by David Blonder, the largest of which claims was the claim asserted by Federated Metals, the credit manager of which was and is one George Kay, who handled the negotiations of Federated Metals with the bankrupt.

From the testimony which has been adduced, it appears that in the middle part of 1950 the bankrupt was in serious financial difficulties, and the operation was being run by a creditors' committee, the chairman of which was George Kay, who represented the said Federated Metals, in connection with its claim against the bankrupt. That thereupon, a voting trust was created whereby the said George Kay was to vote said stock for the benefit of the creditors. Subsequent thereto, the then legal and beneficial owners of said stock executed a written duplicate agreement whereby the said George Kay could dispose of said stock in any manner he desired for the benefit of the creditors of the bankrupt. Sometime during the latter part of September, 1950,

an offer was made to George Kay to purchase the stock held by him for the benefit of the creditors for the sum of $15,000, the funds derived from the sale to be used to make the R.F.C. loan current, to pay the creditors a percentage of the amount owed them and for operating capital. This offer was refused by Kay and by Mr. John Gray, who then appeared to be the sole owner of all the shares of stock of the bankrupt subject to the voting trust vested in Kay, and the statement was made by both Kay and Gray that the sale would not be made because Kay no longer had the power to sell the stock, as Kay and Gray between themselves had abrogated the voting trust and the transfer of shares to Kay by Gray, without consultation with or notification to any of the creditors of the bankrupt.

Thereupon, in the first part of October, 1950, one Bill Lepper acting for himself or Bill Lepper Motors, Inc., a [117] corporation, of which Bill Lepper had control, entered into negotiations with John Gray, the then president and sole stockholder of the bankrupt, for the purpose of acquiring the assets of the bankrupt to the exclusion of the creditors of the bankrupt by the purchase of a then existing obligation held by Reconstruction Finance Corporation against the assets of the bankrupt, with the intention that the security held in connection with that obligation would be foreclosed at a price considerably less than the value of the assets.

Then Lepper or Bill Lepper Motors, Inc., as the case may be, thereupon acquired the obligation held by Reconstruction Finance Corporation. Shortly

thereafter, Lepper entered into the premises of the bankrupt and took over the business of the bankrupt, including various items not involved in the security held by Reconstruction Finance Corporation, and continued the operation of the business of the bankrupt under the name of Consolidated Casting Company. At the same time, Lepper gave notice to customers of the bankrupt that the latter was out of business. Thereafter, a purported foreclosure was had of the physical equipment of the bankrupt secured by chattel mortgage, whereby the physical equipment of the value of at least $15,000 was purchased by said Consolidated Casting Company. Other bids had been made by third parties to the amount of at least $9,000, but same were withdrawn after said Bill Lepper or Consolidated Casting Company paid to the other bidders the sum of $1,000, in consideration of withdrawing from the bidding. A credit in the amount of $1,500 was given against the obligation held by Lepper as the result of such sale. The real property, secured by a deed of trust, was sold by the trustee in bankruptcy herein for the sum of $75,000, said sale being made to one Hugo E. Aleidis, as agent for said Lepper.

Immediately after Lepper went into possession of the [118] premises of the bankrupt, he caused a lease to a portion of the premises (approximately ⅓ thereof) to be executed in favor of said Consolidated Casting Company for a period of five years from date thereof. At the time of the sale held by the trustee in bankruptcy of the real property herein referred to, requests were made by the un-

dersigned that said sale not be held until there could be a determination of the rights of Consolidated Casting Company under the provisions of said purported lease. Objections to the suggestion were made by Lepper, and the property was offered for sale subject to the lease.

It was then and now is the opinion of the undersigned that said property would have brought a considerably higher price if it would have been offered free and clear of the lease to Consolidated Casting Company. The effect of the sale was to eliminate from bidding any person who desired to use all of the premises prior to the expiration of the lease. It is the contention of the undersigned that the acquisition of the property and of the encumbrance held by Reconstruction Finance Corporation by Lepper was for the purpose of hindering, delaying and defrauding creditors of the bankrupt, and that the acts performed by said George Kay as credit manager for said Federated Metals, while acting as chairman of the creditors' committee, were overt acts which contributed directly to the course of conduct by Lepper.

From the time Leslie S. Bowden was appointed receiver and your petitioner, Russell B. Seymour, his attorney, examinations were had of various individuals with an idea of procuring for the estate as many assets as possible, it appeared that there was serious evidence of fraud between the various parties; and your petitioner Russell B. Seymour attempted to file with this Honorable Court a petition setting forth his findings and attempting to

restrain the sale of the real property belonging to the bankrupt under the deed of trust. Your petitioner Russell B. Seymour [119] was advised it was not proper for him to file such a document but that the action contemplated therein should be brought by the trustee when appointed.

When Frank M. Chichester was appointed trustee herein, the file in said case was turned over to the said Frank M. Chichester and David Blonder, his attorney, with the proposed petition, large portions of which have been incorporated in the answer filed at this late date.

Your petitioners herein, both before and after the appointment of the trustee, have constantly alleged that the foreclosure of and the acquisition of the deed of trust and chattel mortgage were intrinsically fraudulent and a fraud upon the creditors; and their attempts to present their case were constantly thwarted by the trustee and his attorney.

That the petition of Bill Lepper Motors, Inc., initiated against the trustee for payment of amounts assertedly due it, was set for hearing on September 20, 1951, but as late as September 18, 1951, no steps had been taken by the trustee or his counsel for the examination of any of the witnesses above referred to—this being in spite of oral direction made by Referee Benno M. Brink at a hearing had on or about August 17, 1951, that steps should be taken immediately by the trustee and his counsel to ascertain the facts pertaining to the contentions made by the undersigned. That on or about the said 18th day

of September, 1951, petitioners orally demanded that the trustee should take steps to conduct the examinations indicated.

Thus, it is the contention of the undersigned that appropriate legal steps be taken against all participants to preserve the assets of the estate of the bankrupt, and it is further the contention of the undersigned, by reason of the foregoing, that the present trustee and his attorney represent interests which are adverse to the estate herein and its [120] creditors generally, or that their actions have been so dilatory that proper parties be appointed to proceed in the name of the trustee to conserve the assets of this estate.

Wherefore, it is prayed that the Court will take such action as to it may appear proper.

/s/ DANIEL W. GAGE,
Attorney for California
By-Products Corporation.

/s/ RUSSELL B. SEYMOUR,
Attorney for E. S. Haven, Armand J. Pihlblad and Sonnett Supply Company.

[Endorsed]: Filed September 27, 1951, [121] Referee.

[Title of District Court and Cause.]

ORDER AUTHORIZING CREDITORS TO PRESENT DEFENSES AND CLAIMS IN BEHALF OF THE ESTATE

On oral application made by Daniel W. Gage on behalf of California By-Products Corporation, a creditor herein, and Russell B. Seymour on behalf of E. S. Haven, Armand J. Pihlblad and Sonnett Supply Company, creditors herein, for an order granting leave to said creditors to make a defense to the claim or claims asserted herein by Bill Lepper Motors, Inc., to certain funds, to wit, approximately $64,944.07, presently held by the trustee as a result of the sale of the real property of the bankrupt, and good cause appearing therefor,

Now, therefore, on motion of said Daniel W. Gage and Russell B. Seymour, as attorneys, respectively, for said creditors, the trustee being present in court and represented by David Blonder and no objections having been made,

Now, Therefore, It Is Ordered that the above-named creditors or any of them may through their respective attorneys or otherwise file such answer and make such defenses and present [122] such claims against said Bill Lepper Motors, Inc., as to them appear proper, with the proviso that such recovery or benefit as may be derived through such defenses or claims presented by such creditors or

any of them shall be for the benefit of the estate herein.

Dated this 28th day of Sept., 1951.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

Approved as to form:

.....

DAVID BLONDER,
Attorney for the Trustee
Herein.

DANIEL W. GAGE and

RUSSELL B. SEYMOUR,

By /s/ RUSSELL B. SEYMOUR,
Attorneys for Creditors.

Receipt of copy acknowledged.

[Endorsed]: Filed September 28, 1951, [123] Referee.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM FILED BY CREDITORS

To the Honorable Reuben G. Hunt, Referee in Bankruptcy:

Pursuant to order of the court heretofore made, come now California By-Products Corporation, represented by Daniel W. Gage, and E. S. Haven,

Armand J. Pihlblad and Sonnett Supply Company, represented by Russell B. Seymour, and file this answer and counterclaim in opposition to the petition of Bill Lepper Motors, Inc., a California corporation, for an order directing the trustee to pay money, and deny and allege as follows, to wit:

1. Admit the allegation of paragraph 1.

2. Admit that the petitioner is the apparent holder, owner and beneficiary of said deed of trust, but deny that the petitioner is entitled to any payment by reason thereof, and herein incorporate by reference all matters hereinafter stated by way of counterclaim or affirmative defense.

3. Deny each of the matters stated in paragraph 3.

4. Admit each of the allegations contained in paragraph 4. [125]

5. Admit each of the allegations contained in paragraph 5.

6. Admit each of the allegations contained in paragraph 6.

And for a First and Further Affirmative Defense and by Way of Counterclaim, Petitioners Allege as Follows:

1. That the obligation for which said deed of trust is assertedly security was likewise secured by that certain chattel mortgage referred to in the petition, executed by the bankrupt in favor of the Re-

construction Finance Corporation, assignor of the petitioner, Bill Lepper Motors, Inc., which said chattel mortgage was dated April 14, 1947, and was recorded on May 2, 1947, in Book 24540, Page 150, of Official Records in the office of the County Recorder of Los Angeles County.

2. These answering creditors are informed and believe, and based upon said information and belief allege that on or about July 17, 1950, George Kay was credit manager of Federated Metals, a creditor herein, and chairman of a creditors' committee previously formed consisting of creditors of the bankrupt, and was the voting trustee of 201 shares of the stock of the bankrupt, and on or about August 2, 1950, obtained authority to sell or otherwise dispose of or use said 200 shares of said stock for the benefit of creditors generally.

3. These answering creditors are informed and believe, and based upon said information and belief allege that on or about July 20, 1950, one John Gray, an attorney at law, became the owner of all of the stock of the bankrupt, subject to the rights of said George Kay, as trustee aforesaid.

4. That on or about September 26, 1950, an offer was made to Gray and Kay of $15,000 for 200 shares of the stock of the bankrupt, said $15,000 to be used as follows: (a) $4,400 to make current the obligation of the bankrupt to the Reconstruction Finance Corporation; (b) to make a payment on account to [126] creditors of the bankrupt; and (c)

the balance to be used for operating purposes. This offer was not accepted.

5. That on or about October 5, 1950, the above offer was renewed, and again it was rejected.

6. That on or about October 12, 1950, Gray, in the presence of William S. Lepper, sometimes known as Bill Lepper, stated to Kay and others that said Bill Lepper was a client of Gray and that Lepper was desirous of paying off the creditors of the bankrupt for a few cents on the dollar, but no firm offer was made. On October 13, 1950, Lepper and Gray again stated that they would make a firm offer to pay off the creditors but first desired to audit the books of the bankrupt.

7. These answering creditors are informed and believe, and based upon said information and belief allege that at all times material herein said William S. Lepper was the principal and controlling stockholder of the petitioner, Bill Lepper Motors, Inc., a corporation.

8. These answering creditors are informed and believe, and based upon said information and belief allege that on or about October 12, 1950, Gray requested the Reconstruction Finance Corporation that its obligation be transferred to the petitioner. The Reconstruction Finance Corporation demanded that written authorization be given by the bankrupt that such transfer be made, and such authorization, signed by Gray as president of the bankrupt, was given to Reconstruction Finance Corporation, which

then transferred its obligation to the petitioner, Bill Lepper Motors, Inc.

9. These answering creditors are informed and believe, and based upon said information and belief allege that on or about October 16, 1950, the petitioner took over the entire business of the bankrupt, including certain personal property not covered by said chattel mortgage of the value of about [127] $5,000, changed the locks to the portion of the premises occupied by the bankrupt, hired the general manager of the bankrupt, one Norman Sather, and commenced to sell products to customers of the bankrupt.

10. These answering creditors are informed and believe, and based upon said information and belief allege that in the latter part of October, 1950, or the early part of November, 1950, the exact time being unknown to these answering creditors, the petitioner purportedly executed a lease of the portion of the premises occupied by the bankrupt prior to October 16, 1950, to Consolidated Casting Company, an adjunct and instrumentality of said William S. Lepper and the petitioner, for a period of five years and surrendered the business of the bankrupt to said Consolidated Casting Company, which since that time has been operating the business of the bankrupt on said premises at a substantial profit, the exact amount thereof being unknown to these answering creditors but known to the petitioner. Upon information and belief, such amount is alleged to be at least $5,000 per month.

11. These answering creditors are informed and believe, and based upon said information and belief allege that the petitioner immediately commenced a foreclosure of said chattel mortgage, and during December, 1950, purported to hold a sale of the personal property of the bankrupt pursuant to the provisions of said chattel mortgage. The reasonable value of said personal property was the sum of approximately $20,000. At said sale, certain bidders made an opening bid on the said property in the amount of $5,000, which bid was increased by the petitioner or its nominee and the opening bidder in successive advances of $500 each until a bid of $9,000 was made by the original bidder. At this point the petitioner or its agent paid to the original bidder the sum of $1,000 in consideration of the original bidder's [128] withdrawing his bid and refraining from further bidding. All previous bids were withdrawn and another bid in the amount of $1,500 was made by the petitioner or its nominee and the property was purportedly sold to the petitioner or its nominee for the sum of $1,500, in which amount the petitioner is endeavoring to credit the obligation of the bankrupt to the petitioner.

12. Immediately thereafter the petitioner declared a default under the provisions of said deed of trust, and as the result thereof a sale of the real property of the bankrupt was set to be held on or about March 14, 1951.

13. An involuntary petition in bankruptcy was filed against the bankrupt herein on February 19,

1951, as the result of which and various orders restraining the sale of said property by Title Insurance and Trust Company, the trustee under said deed of trust, a sale of the said real property was consummated by Frank M. Chichester, trustee in bankruptcy herein, free and clear of the claim of the petitioner, any such claim being transferred to the proceeds of such sale now in possession of said trustee in bankruptcy.

14. These answering creditors are informed and believe, and based upon said information and belief allege that at said sale by the trustee in bankruptcy, the said real property was offered subject to the effect of the claim of the purported lease made by the petitioner to said Consolidated Casting Company for a period of five years from about November, 1950. At said sale there was only one bidder, to wit, one Hugo E. Aleidis, who then and there was and ever since has been the agent and dummy of the petitioner. Said bid was in the amount of $75,000, same being the minimum amount estimated by the trustee in bankruptcy sufficient to pay reasonable costs of administration, costs of sale and asserted claims of lien against the real property. Said Aleidis had been empowered by the petitioner to bid as high as $81,000 for [129] the real property.

15. These answering creditors are informed and believe, and based upon said information and belief allege that at said sale an effort was made by these answering creditors to permit the said real property to be sold only after the validity of the lease claimed

by Consolidated Casting Company should be determined, but such effort was strenuously and successfully opposed by the petitioner. By reason of the facts that Consolidated Casting Company was in possession of the portion of the premises covered by its purported lease and that a determination of the validity of said lease would have required extended litigation, it was impossible to procure any other bidder for said property although these answering creditors are informed and believe, and based upon said information and belief allege that said property could have been sold free and clear for an amount in excess of $90,000.

16. That each and all of the acts performed by the petitioner were performed with the purpose and intent that the creditors of the bankrupt would receive nothing from the assets of the bankrupt and that the petitioner would be able to acquire the assets and business of the bankrupt for less than a fair value.

Wherefore, these answering creditors pray that the following orders be made:

1. Adjudging that the petitioner is entitled to nothing.

2. Requiring the petitioner to account to the trustee in bankruptcy herein for all profits earned by the petitioner and Consolidated Casting Company or either of them since October 16, 1950.

3. Requiring the petitioner to pay over to the trustee the reasonable value of any and all personal

property taken over by the petitioner, not subject to the lien of said chattel mortgage. [130]

4. Granting such other and further relief as may be proper.

DANIEL W. GAGE and

RUSSELL B. SEYMOUR,

By /s/ RUSSELL B. SEYMOUR,

Attorneys for Answering Creditors.

Duly verified.

[Endorsed]: Filed October 1, 1951, [131] Referee.

[Title of District Court and Cause.]

PETITION OF TRUSTEE FOR LEAVE TO COMPROMISE CONTROVERSY

To the Honorable Reuben G. Hunt, Referee in Bankruptcy:

The petition of Frank M. Chichester respectfully represents:

I.

That your petitioner is the duly qualified and acting trustee of the estate of the above-named bankrupt.

II.

That included in the original assets of the above bankrupt at the time said bankrupt was adjudicated a bankrupt, was a certain parcel of real property

located at 1601 East El Segundo Boulevard, El Segundo, California. That said real property was encumbered by a Deed of Trust originally issued in favor of Reconstruction Finance Corporation and subsequently assigned and transferred to Bill Lepper Motors, Inc., a corporation. [134]

III.

On June 14, 1951, this court made its order directing the receiver, or the trustee herein, to sell said real property free and clear of all liens, and free and clear of the aforementioned lien and Deed of Trust held by Bill Lepper Motors, Inc., and further ordering, inter alia, that such liens as may be possessed by Bill Lepper Motors, Inc., be transferred to the proceeds to be received from a sale of said real property; and further ordering that the trustee could by subsequent appropriate proceedings, obtain a determination by this court of the validity, priority, and extent of any lien claimed by the said Bill Lepper Motors, Inc., and the trustee could present for determination any defenses or grounds which he might possess, this court expressly reserving jurisdiction to determine said matters.

IV.

Pursuant to the aforesaid order of June 14, 1951, the trustee did sell said real property for the sum of $75,000.00, which sale was confirmed by this court on July 27, 1951. Thereupon, on September 11, 1951, Bill Lepper Motors, Inc., did file its petition requesting this court for its order directing the Trustee to pay to Bill Lepper Motors, Inc., the

sum of $64,944.07, which sum Bill Lepper Motors, Inc., contended was due to it from the funds in the hands of the trustee which the trustee had obtained from the sale of the real property as aforesaid, and which sum of $64,944.07 the said Bill Lepper Motors, Inc., contended was due to it under the Deed of Trust which it had held on said real property, as aforesaid.

V.

That to said petition of Bill Lepper Motors, Inc., your Trustee filed an answer denying the material allegations set forth therein and setting forth six affirmative defenses by way of counterclaim. Your trustee has, and is now resisting the claim of [135] the said Bill Lepper Motors, Inc., as set forth in his petition. That hearings on said petition and the Trustee's answer thereto have been and now are pending before this court.

VI.

That during the course of said proceedings before this court an offer to compromise the said controversy has been made as follows: (a) Consolidated Casting Co., a corporation, has offered to pay to the Trustee herein the sum of $20,000.00 in cash, (b) Bill Lepper Motors, Inc., has offered to reduce by $1,500.00 the amount which it is claiming from the Trustee herein under the petition filed by it and which is now pending before this court, and (c) the Trustee herein is to pay to Bill Lepper Motors, Inc., out of funds in his hands, the sum of $63,444.00, in full settlement of all the claims of the said Bill Lepper Motors, Inc., and in full settlement of all

claims of the Trustee against the said Bill Lepper Motors, Inc., and against Consolidated Casting Co. (provided, however, that this shall not constitute a release of the trustee's claim of $530.29 against Consolidated Casting Company for rent due to the Trustee). It is proposed that the aforementioned sum of $63,444.00 is to be paid by the Trustee to Bill Lepper Motors, Inc., upon the order approving this compromise becoming final. And it is proposed that upon payment of said sum to Bill Lepper Motors, Inc., the said Bill Lepper Motors, Inc., will assign to the Trustee herein all the right, title and interest of Bill Lepper Motors, Inc., in and to the aforementioned indebtedness and Deed of Trust.

That attached hereto and marked Exhibit A and incorporated herein by reference as though set forth in full, is a copy of the written offer submitted and proposed to the Trustee by Consolidated Casting Co.

VII.

That your Trustee believes and is of the opinion that it [136] would be for the best interests of the estate to accept the aforementioned offer of compromise for the following reasons:

A. It is the Trustee's opinion that the strongest portion of the various contentions which he advanced as defenses to the Bill Lepper Motors, Inc., claim was that portion with dealt with the Trustee's contention that on December 7, 1950, Bill Lepper Motors, Inc., foreclosed upon a chattel mortgage upon personal property belonging to Superior Casting Company, the Bankrupt herein; that said chattel

mortgage was held by Bill Lepper Motors, Inc., by assignment from Reconstruction Finance Corporation, and was security for the same debt secured by the Deed of Trust which is the basis for the Bill Lepper Motors, Inc., claim for $64,944.07; that said foreclosure sale was fraudulent and false and improperly conducted; that bidding was stifled at said sale; that the creditors of Superior Casting Company and the Trustee herein were damaged by said improper foreclosure sale to the extent that the credit that Bill Lepper Motors, Inc., should have allowed against its claim under the Trust Deed as aforesaid, should not have been the sum of $1,500.00 but should have been the actual value of the personal property foreclosed upon by Bill Lepper Motors, Inc., by said chattel mortgage foreclosure sale, plus certain supplies converted at said sale. That said personal property was carried on the books of the bankrupt at a net value, after depreciation, of approximately $28,000.00. That your trustee has been advised by persons who attended said foreclosure sale that they were prepared to bid to $16,000.00 or $17,000.00 for the property at said foreclosure sale. That on this particular phase of the Trustee's defense to the Bill Lepper Motors, Inc., claim, the Trustee could not recover more than the actual value of the property sold at the foreclosure sale, less the sum of $1,500.00, which Bill Lepper Motors, Inc., has already credited on its claim; that from all the Trustee has been [137] able to learn, the value of said property as of December 7, 1950, was between $15,000.00 and $20,000.00.

That by accepting said offer of compromise the Trustee will obtain for this Bankrupt estate an additional sum of $21,500,00 for creditors over and above any other assets of the bankrupt which will come into his hands.

That it is the opinion of the trustee that if he were successful in establishing all of the foregoing facts that on this particular phase of his defense to the claim of Bill Lepper Motors, Inc., that the Trustee could only recover a maximum amount equal to the actual value of the aforementioned property sold at the foreclosure sale; and the Trustee is of the opinion that evidence which show that the value of said property was somewhere between $15,000.00 and $20,000.00, and that the Trustee is of the opinion that on this particular phase of the litigation he could, at best, recover for the estate no more than $20,000.00.

B. That it is the Trustee's opinion that the other and remaining defenses asserted by him in opposition to the claim of Bill Lepper Motors, Inc., as aforesaid, are defenses which are based upon certain theories of law and certain facts which would require the trustee to establish, among other things, the following:

1. Fraudulent intent in transactions between Bill Lepper Motors, Inc., and officers of Superior Casting Company.

2. The theory of a merger having been created by virtue of the fact that Hugo Aleidis did purchase the aforementioned real property on behalf of Bill Lepper Motors, Inc.

3. The theory of a merger having been created by virtue of the fact that when Bill Lepper Motors, Inc., purchased the aforementioned Deed of Trust from [138] Reconstruction Finance Corporation, the said Bill Lepper Motors, Inc., did purchase said Deed of Trust for and on behalf of Superior Casting Company.

4. The legal theory that when Bill Lepper Motors, Inc., foreclosed upon the chattel mortgage, as aforesaid, it thereby waived and eliminated the lien of its Deed of Trust upon the aforementioned real property.

5. The theory that the entire transaction wherein Bill Lepper Motors, Inc., acquired the note, Deed of Trust and chattel mortgage from Reconstruction Finance Corporation was fraudulent and to the detriment of the creditors of the bankrupt, by reason of the fact that Bill Lepper Motors, Inc., did, by such transactions, attempt to obtain the assets of the bankrupt, in fraud of the bankrupt's creditors.

6. The theory of the estoppel, wherein the trustee contends that since on previous court hearings Bill Lepper Motors, Inc., has stated that it was only entitled to the sum of $62,299, that, therefore, it should not be entitled to any more than said sum at the present time. (In this respect, it should be noted that the offer of compromise proposes that Bill Lepper Motors, Inc., should reduce its present claim by the sum of $1,500.00, and would thereupon mean that the trustee would pay to Bill Lepper

Motors, Inc., the sum of $63,444, which is closer to the sum of $62,299.00, being the amount which the trustee [139] contends is the amount originally claimed by Bill Lepper Motors, Inc.)

VIII.

That in the opinion of the trustee, the aforementioned contentions and defenses asserted by him are of such a nature as to require extended litigation and are of such a nature as might not be allowed by this court for the reason that it might well be that this court might not agree with the particular legal theories as advanced by the trustee and with the interpretation of the law as contended by the trustee, as aforesaid. That in the opinion of the trustee, it is possible that the court might disagree with all of the contentions of the trustee and the trustee would recover nothing by this litigation. That by the aforementioned offer of compromise, the trustee will obtain for this estate an additional sum of $21,500.00 for creditors. That it is possible that after extended litigation, this court might agree with the trustee to the effect that the aforementioned foreclosure sale was fraudulent and that if the court did so agree with the trustee, it is the opinion of the trustee he could recover on such particular phase of the litigation somewhere between $15,000.00 and $20,000.00. That if this court did agree with all of the remaining allegations of the trustee, this trustee would be successful in eliminating entirely the whole amount claimed by Bill Lepper Motors, Inc., and that if the trustee were successful on all

points of the litigation the trustee would then be recovering for the estate a sum amounting to $64,-944.07, but in order to make such complete recovery for the estate, it would be necessary for the trustee to establish all of the aforementioned theories and facts. That it is possible that upon extended litigation, that this court might disagree with all of the theories and facts presented by the trustee and that the trustee might recover nothing for this estate. That it is the [140] opinion of the trustee, therefore, that the opportunity to now receive a sum equal to $21,500.00 for creditors of this estate is one that should be taken by the trustee, in order to obtain such a sum of money for the creditors at the present time, rather than to continue protracted litigation, the results of which, in the opinion of the trustee, are uncertain.

Wherefore, your petitioner prays that a meeting of the creditors of the above-entitled bankrupt be called herein, and that an order be made by this court thereupon granting to the petitioner leave and permission to accept the aforementioned offer to compromise the controversy as set forth herein.

/s/ FRANK M. CHICHESTER,
Trustee-Petitioner.

EHRLICH AND BLONDER,

By /s/ DAVID BLONDER, [141]
Attorneys for Petitioner.

EXHIBIT A

October 11, 1951.

David Blonder.

Dear Mr. Blonder:

This is to confirm the fact that I as Attorney for the Consolidated Casting Company offered the sum of $20,000.00 to settle all the controversies that exist in the Bankruptcy proceedings wherein the Superior Casting Company is the Bankrupt.

This is confirmation subject to Court Order and I will obtain that $20,000.00 and have it available when and if the Court confirms this offer.

It is understood that this will settle and terminate all claims that are involved in the Bankruptcy proceeding.

Yours truly,

/s/ JAMES T. BYRNE.

Duly verified.

[Endorsed]: Filed Oct. 15, 1951, Referee. [142]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED COMPROMISE

To the Honorable Reuben G. Hunt, Referee in Bankruptcy:

The undersigned, Russell B. Seymour, is attorney for E. F. Haven, Armand J. Pihlblad and Sonnet Supply Co., each of whom has a claim against the

above-named bankrupt, and Daniel W. Gage is attorney for California By-Products Corporation, a creditor of the above bankrupt.

On behalf of said creditors and each of them, the following objections are hereby presented in connection with the Petition of Trustee for Leave to Compromise Controversy, hearing of which is noticed to be held on October 30, 1951, at the hour of 10:00 o'clock a.m. Grounds for said objections are as follows, to wit:

I.

That the fraudulent sale under the chattel mortgage referred to in said petition absolutely eliminates any deficiency in favor of the obligation now held by Bill Lepper Motors, Inc., to wit: the asserted claim of Bill Lepper Motors, Inc., based on the [144] deed of trust referred to in said petition of the Trustee.

II.

That the Trustee has failed to examine fully, or in some cases at all, various witnesses who have knowledge of the asserted fraud on the part of Bill Lepper Motors, Inc., et al., to wit: Les Scherer, Walter Smith, Norton Sather, one Falkenberg, President of Consolidated Casting Company, Harold J. Ackerman, George Kay, William Cullen, Homer Lewis and John Gray.

III.

That the Trustee was elected by claims represented by David Blonder, attorney for Federated Metals, credit manager for which was George Kay, who was chairman of the creditors' committee of

the bankrupt, against which persons causes of action arising out of the matters proposed to be compromised exist in favor of this estate, for reasons set out in Demand Upon Trustee That Actions Be Brought, the original of which has heretofore been served upon the Trustee and a copy of which is attached hereto and which by reference is made a part hereof.

IV.

That said proposed compromise is not in the best interests of the estate.

Wherefore, it is prayed that said Petition for Leave to Compromise Controversy be denied.

/s/ DANIEL W. GAGE,
Attorney for California
By-Products Corp.

/s/ RUSSELL B. SEYMOUR,
Attorney for E. F. Haven, Armand J. Pihlblad, and Sonnet Supply Co. [145]

[Title of District Court and Cause.]

DEMAND UPON TRUSTEE THAT ACTIONS BE BROUGHT

To: Frank M. Chichester, Trustee herein, and David Blonder:

The undersigned, Russell B. Seymour, is attorney for E. F. Haven, Armand J. Pihlblad and Sonnet Supply Co., each of whom has a claim against the above-named bankrupt, and Daniel W. Gage is at-

torney for California By-Products Corporation, a creditor of the above bankrupt.

On behalf of said creditors and each of them, demand is hereby made that the Trustee will initiate and conduct actions against Bill Lepper Motors, Inc., Federated Metals, George Kay, and each of them in respect to the following matters and for the following reasons.

At various times during these proceedings, examinations under Section 21a and otherwise under the provisions of the Bankruptcy Act have been had herein, same being conducted partially by Russell B. Seymour and the remainder by David Blonder, attorney for Trustee herein.

From the testimony which has been adduced, it appears that in the middle part of 1950 the bankrupt was in financial difficulties [146] and that a creditors' committee was created, the chairman of which was George Kay, who represented said Federated Metals in connection with its claim against the bankrupt. Thereafter, substantially all, if not all, of the stock of the bankrupt was placed in the name of George Kay for the benefit of creditors, and with authority to vote said stock and to dispose of the stock for the benefit of creditors.

In September or October of 1950, one Bill Lepper, acting for himself or for Bill Lepper Motors, Inc., a corporation, of which Bill Lepper had control, entered into negotiations with the bankrupt for the purpose of acquiring the assets of the bankrupt to the exclusion of the creditors of the bankrupt by the purchase of a then existing obligation held by

Reconstruction Finance Corporation against the assets of the bankrupt, with the intention that the security held in connection with that obligation would be foreclosed at a price considerably less than the value of the assets.

In or about September of 1950, an offer was made to George Kay to purchase a portion of the stock held by him, for the sum of $15,000.00, which amount would be used in connection with the operation of the business and the payment of creditors. This offer was rejected by Kay. Reconstruction Finance Corporation refused to transfer the obligation held by it against the assets of the bankrupt unless Kay would abrogate under said trust agreement. Kay, without consultation with or notification of creditors of the bankrupt rescinded the trust agreement. Lepper thereupon acquired the obligation held by Reconstruction Finance Corporation. Shortly thereafter, Lepper entered into the premises of the bankrupt and took over the business of the bankrupt, including various items not involved in the security held by Reconstruction Finance Corporation, and continued the operation of the business of the bankrupt under the name of Consolidated Casting Company. At the same time Lepper gave notice to customers of the bankrupt that the latter was out of business. Thereafter a purported foreclosure was had of the physical [147] equipment of the bankrupt secured by chattel mortgage, whereby the physical equipment of the value of at least $15,000.00 was purchased by said Consolidated Casting Company. Other bids had been made by

third parties to the amount of at least $9,000.00, but same were withdrawn after said Bill Lepper or Consolidated Casting Company paid to the other bidders the sum of $1,000.00, in consideration of withdrawing from the bidding. A credit in the amount of $1,500.00 was given against the obligation held by Lepper as the result of such sale. The real property, secured by a deed of trust, was sold by the trustee in bankruptcy herein for the sum of $75,000.00, said sale being made to one Hugo E. Aleidis, as agent for Lepper.

Immediately after Lepper went into possession of the premises of the bankrupt, he caused a lease to a portion of the premises (approximately ⅓ thereof) to be executed in favor of said Consolidated Casting Company for a period of five years from date thereof. At the time of the sale held by the trustee in bankruptcy of the real property herein referred to, requests were made by the undersigned that said sale not be held until there could be a determination of the rights of Consolidated Casting Company under the provisions of said purported lease. Objections to the suggestion were made by Lepper, and the property was offered for sale subject to the lease.

It was then and now is the opinion of the undersigned that said property would have brought a considerably higher price if it would have been offered free and clear of the lease to Consolidated Casting Company. The effect of the sale was to eliminate from bidding any person who desired to use all of the premises prior to the expiration of the

lease. It is the contention of the undersigned that the acquisition of the property and of the encumbrance held by Reconstruction Finance Corporation was for the purpose of hindering, delaying and defrauding creditors of the bankrupt, and that the acts performed by said George Kay as agent for said [148] Federated Metals, while acting as chairman of the creditors' committee, were overt acts which contributed directly to the course of conduct by Lepper. At said sale there was only one bidder, to wit: one Hugo E. Aleidis, who then and there was, and ever since has been the agent and dummy of Bill Lepper Motors, Inc. Said bid was in the amount of $75,000.00, same being the minimum amount estimated by the Trustee in Bankruptcy sufficient to pay reasonable costs of administration, costs of sale and asserted claims of lien against the real property. Said Aleidis had been empowered by Bill Lepper Motors, Inc. to bid as high as $81,000.00 for the real property.

Thereafter the said Bill Lepper Motors, Inc., endeavored to procure from the Trustee herein the sum of $64,944.07 purportedly due it under the provisions of said Deed of Trust. Objections were made by the Trustee to said claim and the matter partially tried before this court at which time a proposed compromise made whereby said Consolidated Casting Company proposed to pay to the Trustee the sum of $20,000.00 in cash and said Bill Lepper Motors, Inc., proposed to reduce its claim by the amount of $1,500.00 in full settlement of all

claims that the parties might have one against the other.

It is the contention of the undersigned that said Federated Metals, acting through George Kay, and said George Kay individually, committed overt acts in connection with a scheme existing between said Bill Lepper Motors, Inc., and the Bankrupt whereby the said Bill Lepper Motors, Inc., was to acquire property of the bankrupt at an amount substantially less than its value and in a manner which would prevent the creditors of the bankrupt from obtaining any payment of their respective claims.

Further that the said persons are liable to the estate herein for among other things, the amount of $15,000.00, being the sum that was offered for a portion of the stock of the bankrupt rejected by [149] said George Kay as chairman of the creditors committee of the creditors of the bankrupt.

Notice Is Hereby Given that unless appropriate action be commenced by the Trustee herein on or before November 1, 1951, a request will be made of the Bankruptcy Court that the creditors, of some of them, represented by the undersigned, be permitted to initiate and conduct such actions or other litigation as may be appropriate under the circumstances.

.....,

DANIEL W. GAGE,

Attorney for California By-Products Corp.

. . . . . .

RUSSELL B. SEYMOUR,
Attorney for E. F. Haven, Armand J. Pihlblad, and Sonnet Supply Co.

Duly verified.

[Endorsed]: Filed Oct. 30, 1951, Referee. [150]

[Title of District Court and Cause.]

DEMAND UPON TRUSTEE THAT ACTIONS BE BROUGHT

To: Frank M. Chichester, Trustee herein, and David Blonder:

The undersigned, Russell B. Seymour, is attorney for E. F. Haven, Armand J. Pihlblad and Sonnet Supply Co., each of whom has a claim against the above-named bankrupt, and Daniel W. Gage is attorney for California By-Products Corporation, a creditor of the above bankrupt.

On behalf of said creditors and each of them, demand is hereby made that the Trustee will initiate and conduct actions against Bill Lepper Motors, Inc., Federated Metals, George Kay, and each of them in respect to the following matters and for the following reasons.

At various times during these proceedings, examinations under Section 21a and otherwise under the provisions of the Bankruptcy Act have been had herein, same being conducted partially by Russell

B. Seymour and the remainder by David Blonder, attorney for Trustee herein.

From the testimony which has been adduced, it appears that in the middle part of 1950 the bankrupt was in financial difficulties [152] and that a creditors' committee was created, the chairman of which was George Kay, who represented said Federated Metals in connection with its claim against the bankrupt. Thereafter, substantially all, if not all, of the stock of the bankrupt was placed in the name of George Kay for the benefit of creditors, and with authority to vote said stock and to dispose of the stock for the benefit of creditors.

In September or October of 1950, one Bill Lepper, acting for himself or for Bill Lepper Motors, Inc., a corporation, of which Bill Lepper had control, entered into negotiations with the bankrupt for the purpose of acquiring the assets of the bankrupt to the exclusion of the creditors of the bankrupt by the purchase of a then existing obligation held by Reconstruction Finance Corporation against the assets of the bankrupt, with the intention that the security held in connection with that obligation would be foreclosed at a price considerably less than the value of the assets.

In or about September of 1950, an offer was made to George Kay to purchase a portion of the stock held by him, for the sum of $15,000.00, which amount would be used in connection with the operation of the business and the payment of creditors. This offer was rejected by Kay. Reconstruction Finance Corporation refused to transfer the obliga-

tion held by it against the assets of the bankrupt unless Kay would abrogate under said trust agreement. Kay, without consultation with or notification of creditors of the bankrupt rescinded the trust agreement. Lepper thereupon acquired the obligation held by Reconstruction Finance Corporation. Shortly thereafter, Lepper entered into the premises of the bankrupt and took over the business of the bankrupt, including various items not involved in the security held by Reconstruction Finance Corporation, and continued the operation of the business of the bankrupt under the name of Consolidated Casting Company. At the same time Lepper gave notice to customers of the bankrupt that the latter was out of business. Thereafter a purported foreclosure was had of the physical [153] equipment of the bankrupt secured by chattel mortgage, whereby the physical equipment of the value of at least $15,000.00 was purchased by said Consolidated Casting Company. Other bids had been made by third parties to the amount of at least $9,000.00, but same were withdrawn after said Bill Lepper or Consolidated Casting Company paid to the other bidders the sum of $1,000.00, in consideration of withdrawing from the bidding. A credit in the amount of $1,500.00 was given against the obligation held by Lepper as the result of such sale. The real property, secured by a deed of trust, was sold by the trustee in bankruptcy herein for the sum of $75,000.00, said sale being made to one Hugo E. Aleidis, as agent for Lepper.

Immediately after Lepper went into possession

of the premises of the bankrupt, he caused a lease to a portion of the premises (approximately ⅓ thereof) to be executed in favor of said Consolidated Casting Company for a period of five years from date thereof. At the time of the sale held by the trustee in bankruptcy of the real property herein referred to, requests were made by the undersigned that said sale not be held until there could be a determination of the rights of Consolidated Casting Company under the provisions of said purported lease. Objections to the suggestion were made by Lepper, and the property was offered for sale subject to the lease.

It was then and now is the opinion of the undersigned that said property would have brought a considerably higher price if it would have been offered free and clear of the lease to Consolidated Casting Company. The effect of the sale was to eliminate from bidding any person who desired to use all of the premises prior to the expiration of the lease. It is the contention of the undersigned that the acquisition of the property and of the encumbrance held by Reconstruction Finance Corporation was for the purpose of hindering, delaying and defrauding creditors of the bankrupt, and that the acts performed by said George Kay as agent for said [154] Federated Metals, while acting as chairman of the creditors' committee, were overt acts which contributed directly to the course of conduct by Lepper. At said sale there was only one bidder, to wit: one Hugo E. Aleidis, who then and there was, and ever since has been the agent

and dummy of Bill Lepper Motors, Inc. Said bid was in the amount of $75,000.00, same being the minimum amount estimated by the Trustee in Bankruptcy sufficient to pay reasonable costs of administration, costs of sale and asserted claims of lien against the real property. Said Aleidis had been empowered by Bill Lepper Motors, Inc., to bid as high as $81,000.00 for the real property.

Thereafter the said Bill Lepper Motors, Inc., endeavored to procure from the Trustee herein the sum of $64,944.07 purportedly due it under the provisions of said Deed of Trust. Objections were made by the Trustee to said claim and the matter partially tried before this court at which time a proposed compromise made whereby said Consolidated Casting Company proposed to pay to the Trustee the sum of $20,000.00 in cash and said Bill Lepper Motors, Inc., proposed to reduce its claim by the amount of $1,500.00 in full settlement of all claims that the parties might have one against the other.

It is the contention of the undersigned that said Federated Metals, acting through George Kay, and said George Kay individually, committed overt acts in connection with a scheme existing between said Bill Lepper Motors, Inc., and the Bankrupt whereby the said Bill Lepper Motors, Inc., was to acquire property of the bankrupt at an amount substantially less than its value and in a manner which would prevent the creditors of the bankrupt from obtaining any payment of their respective claims.

Further that the said persons are liable to the

estate herein for among other things, the amount of $15,000.00, being the sum that was offered for a portion of the stock of the bankrupt rejected [155] by said George Kay as chairman of the creditors committee of the creditors of the bankrupt.

Notice Is Hereby Given that unless appropriate action be commenced by the Trustee herein on or before November 1, 1951, a request will be made of the Bankruptcy Court that the creditors, of some of them, represented by the undersigned, be permitted to initiate and conduct such actions or other litigation as may be appropriate under the circumstances.

/s/ DANIEL W. GAGE,
Attorney for California
By-Products Corp.

/s/ RUSSELL B. SEYMOUR,
Attorney for E. F. Haven, Armand J. Pihlblad, and Sonnet Supply Co.

[Endorsed]: Filed Oct. 30, 1951, Referee. [156]

[Title of District Court and Cause.]

OBJECTIONS TO AND DISAPPROVAL OF ORDER AUTHORIZING COMPROMISE OF CONTROVERSY, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

To the Honorable Reuben G. Hunt, Referee in Bankruptcy:

Come now California By-Products Corporation, by Daniel W. Gage, its attorney, and E. F. Haven, Armand J. Pihlblad and Sonnet Supply Co., by their attorney, Russell B. Seymour, and each of them pursuant to Rule 7a of this court, disapprove of and object to the proposed order authorizing compromise of controversy, findings of fact and conclusions of law served upon counsel November 9, 1951, in the following respects:

I.

The second paragraph appearing on page 1 of the Order should read as follows:

> "It appearing that at said hearing the trustee was represented by his counsel, David Blonder; Bill Lepper Motors, Inc., was represented by its counsel, Robert Shutan; Consolidated Casting Co., was represented [157] by its counsel, James T. Byrne, and American Smelting and Refining Co., Federated Metals Division thereof, sometimes referred to as Federated Metals, an unsecured creditor of the bankrupt with a claim amounting to $24,245.09 on which claim

David Blonder appears as attorney, appeared by George Kay, its credit manager; all of the aforementioned parties appearing in support of and in favor of the Trustee's petition to compromise," and

[In margin]: Disallowed.

II.

At the end of the first paragraph appearing on page 2, there should be added the following sentence:

"Said objecting creditors offered to adduce evidence in support of their objections and said offer was rejected by the court."

[In margin]: Denied.

III.

That the second paragraph appearing on page 2 should read as follows:

"Without the presentation of any evidence, the court makes its Findings of Fact, Conclusions of Law, and Order as follows."

[In margin]: Denied.

IV.

At paragraph II of Conclusions of Law on pages 4 and 5 should read as follows:

"That the facts alleged in the objections of E. F. Haven, Armand J. Pihlblad, Sonnet Supply Co. and California By-Products Co.,

and the evidence offered in support thereof, which evidence the court refused to receive, are insufficient to warrant a denial of the Trustee's petition for an order authorizing him to compromise the controversy in question, and [158] therefore, such objections should be overruled and denied."

[In margin]: Denied.

/s/ DANIEL W. GAGE,
Attorney for California
By-Products Corp.

/s/ RUSSELL B. SEYMOUR,
Attorney for E. F. Haven, Armand J. Pihlblad and Sonnet Supply Co.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 13, 1951, Referee. [159]

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy No. 51,460-WB

In the Matter of:
SUPERIOR CASTING COMPANY, INC., a California Corporation,

Bankrupt.

ORDER AUTHORIZING COMPROMISE OF CONTROVERSY, FINDINGS OF FACT, CONCLUSIONS OF LAW

The Trustee herein, Frank M. Chichester, having heretofore filed his petition for an order authorizing

him to compromise a certain controversy existing between said Trustee and Bill Lepper Motors, Inc., a corporation, and Consolidated Casting Co., a corporation; and said petition having duly come on for hearing before the Honorable Reuben G. Hunt, Referee in Bankruptcy, on October 30, 1951, at the hour of 10:00 o'clock a.m., of which hearing at least ten (10) days notice by mail was given to the creditors herein, and

It appearing that at said hearing the Trustee was represented by his counsel, David Blonder; Bill Lepper Motors, Inc., was represented by its counsel, Robert Shutan; Consolidated Casting Co. was represented by its counsel, James T. Byrne; and American Smelting and Refining Co., an unsecured creditor of the bankrupt with a claim amounting to $24,245.09, appeared for itself; all of the aforementioned parties appearing in support of and in favor of the Trustee's petition to compromise, [161] and Objections to the Trustee's petition for leave to compromise controversy having been filed on October 30, 1951, by E. F. Haven, an unsecured creditor of the bankrupt in the amount of $1,286.64, and by Armand J. Pihlblad, an unsecured creditor in the amount of $2,450.00, and by Sonnet Supply Co., an unsecured creditor in the amount of $200.00, all of whom were represented at said hearing by their counsel Russell B. Seymour; and objections having also been filed on October 30, 1951, by California By-Products Corporation, an unsecured creditor of the bankrupt in the amount of $10,-

349.07, which was represented at said hearing by its counsel Daniel W. Gage.

Now after a due hearing on said matter, the Court makes its findings of fact, conclusions of law and order thereon as follows:

Findings of Fact

I.

That Consolidated Casting Co., has offered to pay to the Trustee herein, and has in fact placed in the hands of the Trustee, the sum of $20,000.00; and that Bill Lepper Motors, Inc., has agreed to reduce by the sum of $1,500.00 its claim against the Trustee in the sum of $64,944.07 which said claim is based upon the following figures:

To Reconstruction Finance Company	$60,600.00	
Los Angeles County Taxes	2,657.08	
Legal services as of December, 1950	743.00	
Ventilators for building	618.00	
Insurance	791.20	
Interest (detailed breakdown will be shown upon request)	2,144.79	
Attorneys fees in enforcing beneficiary's rights under this trust deed	2,500.00	
Total	$70,054.07	$70,054.07
Receipts:		
Rent received from Consolidated Casting Co.	$ 2,960.00	
Receipt from sale of 1946 Oldsmobile	650.00	
Receipt from sale of personal property	1,500.00	
	$ 5,110.00	5,110.00
		$64,944.07

II.

That as the results of the aforementioned payment by Consolidated Casting Co., and the afore-

mentioned reduction of claim by Bill Lepper Motors, Inc., this bankrupt estate will receive a net sum of $21,500.00 in settlement of the controversy which is the subject of the Trustee's petition to compromise.

III.

That the Trustee, Consolidated Casting Co., Bill Lepper Motors, Inc., through their counsel, and American Smelting and Refining Co., an unsecured creditor of the bankrupt in the amount of $24,-245.09, all approved of and recommend that this Court approve of and authorize the Trustee to compromise the controversy which is the subject of the Trustee's petition herein; and all of said parties are of the opinion that it is proper and for the best interest of this bankrupt estate to accept and approve of said compromise.

IV.

That the unsecured creditors, E. F. Haven, Armand J. Pihlblad, and Sonnet Supply Co., unsecured creditors with claims totaling $3,936.64, through their counsel, and California By-Products Co., an unsecured creditor with a claim of $10,-349.07, through its counsel, did object to the proposed compromise and did request this Court to deny the Trustee's petition to compromise the controversy.

V.

That this Court did offer to said objecting creditors, in lieu of a compromise of the matters set forth in the Trustee's petition, that said objecting

creditors could take over the litigation which was the basis of the offer of compromise, and that the Court then would not authorize the compromise, provided however, that as a condition of such action by this Court, said objecting creditors should guarantee to the Trustee and this bankrupt [163] estate that they would receive from such litigation at least the net minimum sum of $21,500.00. That said objecting creditors, through their respective counsel, Russell B. Seymour and Daniel W. Gage, expressly refused to make such guarantee and further expressly refused to agree to indemnify the Trustee in the sum of $21,500.00 or in any amount whatsoever, in the event the compromise was not authorized by this Court and said Trustee was ultimately unsuccessful in prevailing in the litigation which is the basis for the Trustee's petition to compromise.

VI.

That the matters set forth in Paragraphs I and III of the objections to Proposed Compromise are included in and are part of the issues raised in the litigation which the Trustee proposes to compromise, which issues are raised by the following pleadings on file herein: (a) Petition of Bill Lepper Motors, Inc., for order directing Trustee to pay money, (b) Answer of Frank Chichester, Trustee, in opposition to Petition of Bill Lepper Motors, Inc., for Order Directing Trustee to Pay Monies, and (c) Answer and counterclaim to petition of Bill Lepper Motors, Inc., filed by creditors California By-Products Co., E. F. Haven, Armand J. Pihlblad, and Sonnett Supply Co.

VII.

That the allegations contained in Paragraphs II and IV of the objections to proposed compromise are not true.

VIII.

That the allegations contained in Paragraphs I to VII of the Trustee's petition for leave to compromise controversy are true.

Conclusions of Law

I.

That the proposed compromise recommended by the Trustee is proper and for the best interest of this estate in bankruptcy.

II.

That the facts alleged in the objections of E. F. Haven, Armand J. Pihlblad, Sonnett Supply Co., and California By-Products [164] Co., and the evidence offered in support thereof are insufficient to warrant a denial of the Trustee's petition for an order authorizing him to compromise the controversy in question, and therefore, such objections should be overruled and denied.

III.

That the Trustee's petition for an order authorizing him to compromise the controversy in question should be granted.

Order

Now, Therefore, it is

Ordered that the petition of the Trustee for leave

to compromise the controversy set forth in his petition is hereby granted and said compromise is hereby approved; and it is further

Ordered that the objections of E. F. Haven, Armand J. Pihlblad, Sonnett Supply Co., and California By-Products Co., to said petition, are hereby denied and overruled; and it is further

Ordered that the Trustee be and he is hereby authorized to execute any and all necessary and proper documents and to do all things necessary to give full effect to this order approving the compromise, including without limitation the right of the Trustee to do as follows:

1. Receiving and accepting from Consolidated Casting Co., the sum of $20,000.00.

2. Granting to and receiving from Consolidated Casting Co., mutual releases of any and all claims arising from the matters raised by the issues in the litigation now pending before this Court.

3. Receiving and accepting from Bill Lepper Motors, Inc., a statement in writing, showing a reduction of $1,500.00 in the claim which it asserts against the Trustee, thereby making the total claim which it asserts against the Trustee the sum of $63,444.07.

4. Paying to Bill Lepper Motors, Inc., the sum of $63,444.07 [165] in full settlement of its claims against the Trustee.

5. Granting and receiving from Bill Lepper Motors, Inc., mutual releases of any and all claims

arising from the matters raised by the issues in the litigation now pending before this Court.

6. Receiving from Bill Lepper Motors, Inc., an assignment of the right, title and interest of Bill Lepper Motors, Inc., in and to that certain indebtedness secured by that said Deed of Trust dated April 14, 1947, and in and to said Deed of Trust itself, which said Deed of Trust was recorded May 2, 1947, in Book 24521, Page 242 Official Records of Los Angeles County, State of California, wherein Title Insurance and Trust Company is the Trustee and said Bill Lepper Motors, Inc., is the beneficiary by reason of an assignment made by the original beneficiary, to wit: Reconstruction Finance Corporation.

Dated: November 15th, 1951.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy. [166]

The foregoing is approved as to form.

/s/ ROBERT H. SHUTAN,
Attorney for Bill Lepper Motors, Inc.

/s/ JAMES T. BYRNE,
Attorney for Consolidated Casting Co.

11/9/51 not approved—specific points of disapproval will be filed within five days.

/s/ DANIEL W. GAGE,
Attorney for California By-Products Co.

11/9/51 not approved—specific points of disapproval will be filed within five days.

/s/ RUSSELL B. SEYMOUR,
Attorney for Sonnett Supply Co., Armand J. Pihlblad, and E. F. Haven.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 15, 1951, Referee. [167]

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable Reuben G. Hunt, Referee in Bankruptcy:

Come now California By-Products Corporation, by Daniel W. Gage, its attorney, and E. F. Haven, Armand J. Pihlblad and Sonnet Supply Co., by their attorney, Russell B. Seymour, and each of them and file this petition for review and respectfully represent:

I.

Your petitioners and each of them are aggrieved by Order herein of Reuben G. Hunt, Referee in Bankruptcy, dated November 15, 1951, a copy of which Order is annexed hereto and made a part hereof.

II.

The Referee erred in approving the proposed compromise referred to in the Petition of Trustee for Leave to Compromise Controversy for the reasons:

(a) That based upon the facts set forth in said [169] Trustee's petition, Bill Lepper Motors, Inc., is entitled to nothing.

(b) That the compromise is not in the best interests of the estate.

It appears from the Trustee's petition and from the statements of counsel for the Trustee made at the hearing thereon, that the obligation held by Bill Lepper Motors, Inc., was secured by a chattel mortgage against certain personal property of the bankrupt and by a trust deed against certain real property of the bankrupt. Bill Lepper Motors, Inc., was endeavoring to procure the sum of approximately $64,944.07 from the proceeds of a sale of said real property by the Trustee in Bankruptcy, and under the compromise is to be paid the sum of $63,444.07.

Prior to bankruptcy a purported sale was had by Bill Lepper Motors, Inc., foreclosing the chattel mortgage, which sale was fraudulently conducted, in that the bidding at said sale was stifled. The bids for the personal property being sold had reached the sum of about $9,000.00, the particular bid being made by Messrs. Smith and Scherer at which point the agents in charge of the sale and Consolidated Casting Co., a party to the compromise, paid to the only other bidder, Messrs. Smith and Scherer, the sum of $1,000.00 to refrain from bidding and to withdraw their existing bid. The property was then sold to Consolidated Casting Co., or its agent, for $1,500.00, which was the amount

credited on the obligation of Bill Lepper Motors, Inc.

Under the law of the State of California, a fraudulent or improper sale under foreclosure of a chattel mortgage renders it impossible for the holder of an obligation secured thereby to obtain a deficiency. [170]

III.

The Referee erred in requiring these objecting creditors to deposit cash or a bond in the amount of $21,500.00 as a condition precedent to denying the petition to approve the proposed compromise, said action being an abuse of discretion and without any authority in law.

IV.

The Referee erred in making said order without the Trustee or any other person having adduced any evidence in support of said petition of the Trustee.

V.

The Referee erred in refusing to permit the objecting creditors, including these petitions in review, to adduce any evidence in support of their objections, and in particular, among other things, in refusing to permit the introduction of evidence showing the fraudulent sale and stifling of bidding on the part of Bill Lepper Motors, Inc., adverted to in paragraph II above.

VI.

The Referee erred in failing to find:

(a) That the objecting creditors offered to

adduce evidence in support of their objections; and

(b) That said offer was refused by the court.

VII.

The Referee erred in finding that the allegations in paragraphs II and IV of the objections to proposed compromise are not true, for the reason that no evidence was adduced in respect thereto and that the Referee refused to permit any evidence to be adduced.

VIII.

The Referee erred in finding that the allegations in [171] paragraphs I to VII of the Trustee's petition for leave to compromise controversy are true, for the reasons that no evidence in respect thereto was adduced by the Trustee and the Referee refused to permit the objecting creditors to adduce any evidence at all.

IX.

The Referee erred in refusing to include as part of his order that American Smelting & Refining Co., Federated Metals Division thereof, sometimes referred to as Federated Metals, an unsecured creditor of the bankrupt with a claim amounting to $24,245.09, on which claim David Blonder appears as attorney, appeared by George Kay, its credit manager.

The objecting creditors have caused a reporter's transcript of the proceedings had at the hearing on the Trustee's petition for leave to compromise controversy to be filed with the referee.

Wherefore, petitioners for review pray that said order be reviewed by a Judge of this court; that the Referee's Order be reversed; that said Petition for Leave to Compromise Controversy be denied; and such other and further orders be made as appear proper.

DANIEL W. GAGE and

RUSSELL B. SEYMOUR,

By /s/ RUSSELL B. SEYMOUR,

Attorneys for Petitioners for Review and Objecting Creditors. [172]

State of California,
County of Los Angeles—ss.

Mack Cottler, being by me first duly sworn, deposes and says: That he is one of the petitioners herein, namely President of California By-Products Corporation, in the above-entitled action; that he has read the foregoing Petition for Review and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

/s/ MACK COTTLER.

Subscribed and sworn to before me this 23rd day of November, 1951.

[Seal] /s/ RUSSELL B. SEYMOUR,
Notary Public in and for Said County and State.

State of California,
County of Los Angeles—ss.

June E. Jenkins, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above-entitled action; that affiant's place of business is: 1120 Rowan Bldg., Los Angeles 13, California; that on the 23rd day of November, 1951, affiant served the within Petition for Review on the respondents in said action, by placing a true copy thereof in an envelope addressed to the attorneys for said respondents as follows:

David Blonder, Attorney at Law, 608 S. Hill St., Los Angeles 14, Calif.

Robert H. Shutan, Attorney at Law, 333 S. Beverly Dr., Beverly Hills, Calif.

James T. Byrne, Attorney at Law, 214 Rowan Bldg., Los Angeles 13, Calif.

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California. That there is a regular communication by mail between the place of mailing and the places so addressed.

/s/ JUNE E. JENKINS.

Subscribed and sworn to before me this 23rd day of November, 1951.

[Seal] /s/ RUSSELL B. SEYMOUR,
Notary Public in and for Said
County and State. [173]

[Title of District Court and Cause.]

ORDER AUTHORIZING COMPROMISE OF CONTROVERSY, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Trustee herein, Frank M. Chichester, having heretofore filed his petition for an order authorizing him to compromise a certain controversy existing between said Trustee and Bill Lepper Motors, Inc., a corporation, and Consolidated Casting Co., a corporation; and said petition having duly come on for hearing before the Honorable Reuben G. Hunt, Referee in Bankruptcy on October 30, 1951, at the hour of 10:00 o'clock a.m., of which hearing at least ten (10) days notice by mail was given to the creditors herein, and

It appearing that at said hearing the Trustee was represented by his counsel, David Blonder; Bill Lepper Motors, Inc., was represented by its counsel, Robert Shutan; Consolidated Casting Co., was represented by its counsel, James T. Byrne; and American Smelting and Refining Co., an unsecured creditor of the bankrupt with a claim amounting to $24,245.09, appeared for itself; all of the aforementioned parties appearing in support of and in favor of the Trustee's petition to compromise, [174] and

Objections to the Trustee's petition for leave to compromise controversy having been filed on October 30, 1951, by E. F. Haven, an unsecured creditor of the bankrupt in the amount of $1,286.64, and by Armand J. Pihlblad, an unsecured creditor in the

amount of $2,450.00, and by Sonnet Supply Co., an unsecured creditor in the amount of $200.00, all of whom were represented at said hearing by their counsel Russell B. Seymour; and objections having also been filed on October 30, 1951, by California By-Products Corporation, an unsecured creditor of the bankrupt in the amount of $10,349.07, which was represented at said hearing by its counsel Daniel W. Gage.

Now after a due hearing on said matter, the Court makes its findings of fact, conclusions of law and order thereon as follows:

Findings of Fact

I.

That Consolidated Casting Co., has offered to pay to the Trustee herein, and has in fact placed in the hands of the Trustee, the sum of $20,000.00; and that Bill Lepper Motors, Inc., has agreed to reduce by the sum of $1,500.00 its claim against the Trustee in the sum of $64,944.07 which said claim is based upon the following figures:

To Reconstruction Finance Company	$60,600.00	
Los Angeles County Taxes	2,657.08	
Legal services as of December, 1950	743.00	
Ventilators for building	618.00	
Insurance	791.20	
Interest (detailed breakdown will be shown upon request)	2,144.79	
Attorneys fees in enforcing beneficiary's rights under this trust deed	2,500.00	
Total	$70,054.07	$70,054.07

Receipts:		
Rent received from Consolidated Casting Co.	$ 2,960.00	
Receipt from sale of 1946 Oldsmobile	650.00	
Receipt from sale of personal property	1,500.00	
	$ 5,110.00	5,110.00
		$64,944.07

II.

That as the results of the aforementioned payment by Consolidated Casting Co., and the aforementioned reduction of claim by Bill Lepper Motors, Inc., this bankrupt estate will receive a net sum of $21,500.00 in settlement of the controversy which is the subject of the Trustee's petition to compromise.

III.

That the Trustee, Consolidated Casting Co., Bill Lepper Motors, Inc., through their counsel, and American Smelting and Refining Co., an unsecured creditor of the bankrupt in the amount of $24,-245.09, all approved of and recommend that this Court approve of and authorize the Trustee to compromise the controversy which is the subject of the Trustee's petition herein; and all of said parties are of the opinion that it is proper and for the best interest of this bankrupt estate to accept and approve of said compromise.

IV.

That the unsecured creditors, E. F. Haven, Armand J. Pihlblad, and Sonnet Supply Co., unsecured creditors with claims totaling $3,936.64, through their counsel, and California By-Products Co., an unsecured creditor with a claim of $10,-

349.07, through its counsel, did object to the proposed compromise and did request this Court to deny the Trustee's petition to compromise the controversy.

V.

That this Court did offer to said objecting creditors, in lieu of a compromise of the matters set forth in the Trustee's petition, that said objecting creditors could take over the litigation which was the basis of the offer of compromise, and that the Court then would not authorize the compromise, provided however, that as a condition of such action by this Court, said objecting creditors should guarantee to the Trustee and this bankrupt [176] estate that they would receive from such litigation at least the net minimum sum of $21,500.00. That said objecting creditors, through their respective counsel, Russell B. Seymour and Daniel W. Gage, expressly refused to make such guarantee and further expressly refused to agree to indemnify the Trustee in the sum of $21,500.00 or in any amount whatsoever, in the event the compromise was not authorized by this Court and said Trustee was ultimately unsuccessful in prevailing in the litigation which is the basis for the Trustee's petition to compromise.

VI.

That the matters set forth in Paragraphs I and III of the objections to Proposed Compromise are included in and are part of the issues raised in the litigation which the Trustee proposes to compromise, which issues are raised by the following pleadings

on file herein; (a) Petition of Bill Lepper Motors, Inc., for order directing Trustee to pay money, (b) Answer of Frank Chichester, Trustee, in opposition to Petition of Bill Lepper Motors, Inc., for Order Directing Trustee to Pay Monies, and (c) Answer and counterclaim to petition of Bill Lepper Motors, Inc., filed by creditors California By-Products Co., E. F. Haven, Armand J. Pihlblad, and Sonnett Supply Co.

VII.

That the allegations contained in Paragraphs II and IV of the objections to proposed compromise are not true.

VIII.

That the allegations contained in Paragraphs I to VII of the Trustee's petition for leave to compromise controversy are true.

Conclusions of Law

I.

That the proposed compromise recommended by the Trustee is proper and for the best interest of this estate in bankruptcy.

II.

That the facts alleged in the objections of E. F. Haven, Armand J. Pihlblad, Sonnett Supply Co., and California By-Products [177] Co., and the evidence offered in support thereof are insufficient to warrant a denial of the Trustee's petition for an order authorizing him to compromise the contro-

versy in question, and therefore, such objections should be overruled and denied.

III.

That the Trustee's petition for an order authorizing him to compromise the controversy in question should be granted.

Order

Now, Therefore, it is

Ordered that the petition of the Trustee for leave to compromise the controversy set forth in his petition is hereby granted and said compromise is hereby approved; and it is further

Ordered that the objections of E. F. Haven, Armand J. Pihlblad, Sonnett Supply Co., and California By-Products Co., to said petition, are hereby denied and overruled; and it is further

Ordered that the Trustee be and he is hereby authorized to execute any and all necessary and proper documents and to do all things necessary to give full effect to this order approving the compromise, including without limitation the right of the Trustee to do as follows:

1. Receiving and accepting from Consolidated Casting Co., the sum of $20,000.00.

2. Granting to and receiving from Consolidated Casting Co., mutual releases of any and all claims arising from the matters raised by the issues in the litigation now pending before this court.

3. Receiving and accepting from Bill Lepper Motors, Inc., a statement in writing, showing a reduction of $1,500.00 in the claim which it asserts against the Trustee, thereby making the total claim which it asserts against the Trustee the sum of $63,444.07.

4. Paying to Bill Lepper Motors, Inc., the sum of $63,444.07 [178] in full settlement of the claims against the Trustee.

5. Granting and receiving from Bill Lepper Motors, Inc., mutual releases of any and all claims arising from the matters raised by the issues in the litigation now pending before this Court.

6. Receiving from Bill Lepper Motors, Inc., an assignment of the right, title and interest of Bill Lepper Motors, Inc., in and to that certain indebtedness secured by that said Deed of Trust dated April 14, 1947, and in and to said Deed of Trust itself, which said Deed of Trust was recorded May 2, 1947, in Book 24521, page 242, Official Records of Los Angeles County, State of California, wherein Title Insurance and Trust Company is the Trustee and said Bill Lepper Motors, Inc., is the beneficiary by reason of an assignment made by the original beneficiary, to wit: Reconstruction Finance Corporation.

Dated November 15, 1951.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy. [179]

The foregoing is approved as to form.

/s/ ROBERT H. SHUTAN,
Attorney for Bill Lepper Motors, Inc.

/s/ JAMES T. BYRNE,
Attorney for Consolidated Casting Co.

Not approved—special points of disapproval will be filed within (5) five days:

/s/ DANIEL W. GAGE,
Attorney for California By-Products Co.

/s/ RUSSELL B. SEYMOUR,
Attorney for Sonnett Supply Co., Armand J. Pihlblad and E. F. Haven.

11/9/51. Not approved—specific points of disapproval will be filed within 5 days:

RUSSELL B. SEYMOUR.

[Endorsed]: Filed November 23, 1951, [180] Referee.

[Title of District Court and Cause.]

SUPPLEMENT TO CERTIFICATE OF REFEREE ON REVIEW OF ORDER GRANTING PETITION TO COMPROMISE CONTROVERSY

To the Honorable William M. Byrne, Judge of the Above-Entitled Court

I, Benno M. Brink, one of the Referees in Bankruptcy of the above-entitled Court, do hereby, at the request of Russell B. Seymour and Daniel W. Gage, attorneys for certain parties in interest in this matter, supplement the Certificate of Referee on Review of Order Granting Petition to Compromise Controversy which I filed in this matter on February 8, 1952, by transmitting as part of the papers in the case the following records, to wit:

1. Reporter's transcript of proceedings on October 2, 1951, and October 4, 1951, filed January 3, 1952.

2. Reporter's transcript of proceedings on October 30, 1951, filed November 13, 1951. [181]

3. The following exhibits:

Petitioner's exhibit No. 1, note secured by mortgage of chattels and deed of trust, with attachments, filed October 2, 1951.

Petitioner's exhibit No. 2, deed of trust dated April 14, 1947, filed October 2, 1951.

Petitioner's exhibit No. 3, assignment of deed of trust dated October 13, 1950, filed October 2, 1951.

Petitioner's exhibit No. 4, notice of default and

election to sell under deed of trust, dated November 10, 1950, filed October 2, 1951.

Trustee's exhibit No. 1, mortgage of chattels, filed October 4, 1951.

Dated: February 15, 1952.

/s/ BENNO M. BRINK,
Referee in Bankruptcy. [182]

[Endorsed]: Filed February 15, 1952, U.S.D.C.

In the District Court of the United States for the Southern District of California Central Division

In Bankruptcy, No. 51,460-WB

In the Matter of:
SUPERIOR CASTING CO., INC., a California Corporation,

Bankrupt.

Before: The Honorable Reuben G. Hunt, Referee in Bankruptcy, Presiding.

REPORTER'S TRANSCRIPT OF HEARING ON ORDER TO SHOW CAUSE, BILL LEPPER MOTORS, INC., VS. TRUSTEE, ET AL.

Appearances:

For the Trustee:
DAVID BLONDER, ESQ.

For Certain Creditors:
DANIEL W. GAGE, ESQ., and
RUSSELL B. SEYMOUR, ESQ.

For Bill Lepper Motors, Inc.:
ROBERT H. SHUTAN, ESQ.

For Hugo E. Aleidis:
W. FLOYD COBB, ESQ. [185]

Tuesday, October 2, 1951—2 P.M.

The Referee: Superior Casting Company.

Now, I have read over the answer to the petition filed October 1, 1951. It seems to me the objection here is the same one that was made at the sale, that the price was insufficient and that these parties had information that more could be obtained but they had no offer in sight. Am I right or wrong?

Mr. Seymour: Well, that part is incidental in the whole matter.

The Referee: That is the basis of the whole answer, isn't it?

Mr. Seymour: No, that is only a part of it, your Honor.

The Referee: What other relief do you want? It says here you want the Trustee to account for the use of this property——

Mr. Seymour: No, not the Trustee.

The Referee: But I don't see any basis for that unless you can show this sale was improper, and that is the whole crux of the matter.

Mr. Seymour: I don't think so. I will try to ex-

plain what I have in mind or what I tried to relate in the answer and counterclaim.

The Referee: Well now, just a minute here. What do [186] you mean, counterclaim? You certainly are not claiming any counterclaim?

Mr. Seymour: We are on behalf of the estate.

The Referee: Well, I know, but—well, all right. Go ahead.

Mr. Blonder: I may point out that the Trustee himself has filed an answer setting out what we term certain affirmative defenses, which is a counterclaim in effect. Has the Court seen that answer?

The Referee: Is the Trustee complaining of the sale he made?

Mr. Blonder: No, the Trustee is not complaining of the sale he made, but the Trustee is contending that Mr. Bill Lepper is not entitled to the $64,000.

The Referee: Oh, well, that is a different matter.

Mr. Blonder: No, the Trustee is not complaining about the sale he made.

The Referee: All right.

Mr. Seymour: As a matter of fact, your Honor, may I suggest that we are taking no steps to upset that sale. I would like to have that understood. We are not complaining that we want to have the sale set aside. We are not saying that at all, and if I could—it will take me a few minutes——

The Referee: Yes. Here is what I don't understand, what right you have got to do the Trustee's work. Isn't [187] that for the Trustee to do?

Mr. Seymour: It is for the Trustee.

The Referee: Has the Trustee refused to do it?

Mr. Seymour: Oh, we have been for a long time, shall I say,—howling our heads off.

The Referee: No, has the Trustee refused to do this?

Mr. Seymour: He hasn't done it yet.

The Referee: Then I don't see what standing you have. If the Trustee refuses to perform his duty, then you can come in and inform the Court of that and the Court can permit you, on condition, to step into the shoes of the Trustee and go ahead.

Mr. Seymour: I appreciate that. Now, your Honor, in that respect there was a document handed to your Honor at the previous hearing. I don't know whether it has been marked filed yet or hasn't been. I haven't looked in the file, but in any event that sets forth certain matters there which I think your Honor should take cognizance of and which I assume you may have when on last Friday you made an order permitting the creditors——

The Referee: I am trying to get down to the heart of this.

Mr. Seymour: I would like to have about five or six minutes to relate what I think the substance of the defenses is.

Mr. Blonder: Are they your defenses or the Trustee's? [188] Let's make that clear.

Mr. Seymour: Whether they are yours or ours, they are all for the benefit of the estate.

Mr. Blonder: I don't want Mr. Seymour to speak for the Trustee.

The Referee: The Trustee is the one that repre-

sents the estate. As the Court pointed out in the American Fidelity Corporation case, if we permitted every creditor to come in here and do the work of the Trustee we would never get anywhere.

What is the Trustee's position?

Mr. Blonder: I can explain the Trustee's position very clearly and very quickly.

The Referee: Do you want this creditor to collaborate with you?

Mr. Blonder: I don't need him, your Honor. As far as I am concerned, Mr. Seymour and Mr. Gage have done nothing but obstruct what the Trustee is attempting to do.

The Referee: That is my view of it.

Mr. Blonder: If they feel that either I or the Trustee are incompetent, I recommend that they file a petition setting forth their facts and let's have a hearing on it. I am not afraid of it, but so far all we have heard is these many allegations which it is extremely difficult to pin right down.

If the Court desires, I will now explain the Trustee's [189] position insofar as the matters before your Honor are concerned.

The Referee: Go ahead.

Mr. Blonder: Mr. Bill Lepper contends he is entitled to a certain amount of money, which contention is based upon the following:

Some time back Superior Casting Company obtained a loan from the Reconstruction Finance Corporation. That loan was secured by a trust deed on real estate and upon a chattel mortgage on certain personal property.

Subsequently it appears that Bill Lepper by assignment purchased that trust deed and chattel mortgage supported by the loan from the Reconstruction Finance Corporation, and it is Bill Lepper Motors' contention that they thereby became a secured creditor.

At a later period—this was all in 1950—Bill Lepper Motors went through a proceeding which appeared to be an attempt to foreclose upon the chattel mortgage part of that encumbrance, and as a result of that particular proceeding a foreclosure action took place out in El Segundo where the property is located.

Subsequently an involuntary petition in bankruptcy was filed against Superior Casting Company, and later on the Superior Casting Company was adjudicated a bankrupt.

During the period of time that the bankruptcy matters have been pending, Bill Lepper Motors has been attempting to [190] collect some sixty odd thousand dollars, contending that they had that amount due on the trust deed on the real property.

Various orders were made by this Court, and pursuant to those orders the real property was sold here a couple of months ago for $75,000; and in accordance with the previous orders the Bill Lepper Motors lien, if any, was transferred from the real property to the funds obtained from the sale of the real property. Those funds are now in the hands of the Trustee.

Bill Lepper Motors filed a petition seeking to re-

cover some sixty odd thousand dollars from the Trustee.

That brings the matter up to date for the moment.

The Trustee through 21a proceedings and through other efforts, and I may state through no help at all from Mr. Seymour or Mr. Gage, just independently, developed certain evidence which he feels will enable this Court to either entirely disallow the Bill Lepper Motors claim or at least disallow part of it, and if the Court will bear with me I will submit our theory or our theories through which we contend that the petitioner's claim is unfounded.

The Referee: Before we get into that, I want to read this for the benefit of everybody. This is the case of In Re American Fidelity Corporation, Ltd., decided by the late Judge Jenney of this Court some years ago. It is 40 ABR New Series 329, 28 Federal Supplement 462.

"The Trustee primarily represents the unsecured creditors, [191] and represents the secured creditors only in his capacity as a custodian of the property upon which they have a lien. He is not to be dictated to by creditors and should follow his own best judgment, even in determining what appearances he should make. It would indeed be intolerable and make impossible the orderly administration of bankrupt estates, if creditors were allowed to intervene and participate in matters of litigation of which the Trustee has charge, under the supervision and control of this Court. If the bars were let down, each creditor might conceivably appear separately to be heard; thus invoking a flood of proceedings which

would engulf the time of the Federal Court and make efficient functioning most difficult."

Then he refers to certain cases.

"It is pointed out in those cases that if the Trustee fails to do his duty, any interested creditor may make demand upon him for appropriate action, and if he fails to act promptly, the creditor may, with permission of the Court, act on behalf of the estate and in the name of the Trustee. In such instance, the Court may feel disposed to require indemnity of the creditor against costs, or may charge the costs against him if he is unsuccessful; but in any event he acts with the consent of the Court."

Now I will hear Mr. Seymour for five or six minutes he said. What have you got to say to that?

Mr. Seymour: I have got to say that, No. 1, I think [192] your Honor can almost take judicial knowledge of the fact that we have been yapping up here ever since there has been a Trustee.

The Referee: That is beside the point. I don't care whether you have been yapping or not. Coming right down to the substance, what have you got to say to this?

Mr. Seymour: The substance of the reasons why we think the creditors we represent, or as far as that goes any creditor, should take some steps in this proceeding, are set forth quite definitely in my opinion in the document I handed to your Honor at the last hearing, I think on Thursday.

The Referee: I know all that, Mr. Seymour, but do you claim here the Trustee is failing to do his duty?

Mr. Seymour: Up to date; and one more thing that is perhaps equally important if not more so is that we have set forth——

The Referee: Never mind. Answer my question. Do you claim that the Trustee——

Mr. Seymour: Yes.

The Referee: In what respect?

Mr. Seymour: In that on the 17th day of August before this Court when Referee Brink was sitting, the Trustee and his counsel were instructed to immediately bring on 21a examinations of various persons looking to the endeavor to find out the merits or lack thereof of the claims made in this proceeding. [193]

The Referee: Well now, wait a minute. Did you do that or didn't you?

Mr. Seymour: And when?

Mr. Blonder: Your Honor, these witnesses, there is probably eight of them, are all here as a result of information elicited as a result of 21a proceedings prior to today, and these witnesses are here, among others, to substantiate the Trustee's claim.

The Referee: Then you followed Referee Brink's instructions?

Mr. Blonder: I did; and furthermore——

The Referee: Then that clears that thing up. What else have you got?

Mr. Seymour: I haven't finished my remarks.

The Referee: Never mind. Have you finished this one subject?

Mr. Seymour: No.

The Referee: Then you claim they didn't conduct the examinations?

Mr. Seymour: A yes or no answer will be involved. As the petition was filed by Bill Lepper Motors to get his $65,000, I don't have the exact date in mind but I think it was around the 10th of September,——

The Referee: Well, you are going off on another subject.

Mr. Seymour: I don't think so. [194]

The Referee: Yes, you are, too. Let's finish up this 21a examination.

Mr. Seymour: That is what I am trying to do.

The Referee: You say they didn't conduct a 21a examination?

Mr. Seymour: Until an attempt to show——

The Referee: I don't care when they did it. They did it, didn't they?

Mr. Seymour: After we got on their necks.

The Referee: That is all right. They did it, didn't they?

Mr. Seymour: He has subpoenaed certain witnesses.

The Referee: Counsel says he has taken their testimony.

Mr. Seymour: Only after we had made demand, and he hasn't completed it yet.

The Referee: Never mind, he did it.

Mr. Seymour: I can't help it, your Honor. I came up to this court—the hearing, if my memory serves me correctly, was on the 18th of September, I think it was——

The Referee: Well, I don't want to hear anything more about it. It was done. If it wasn't done that would be entirely different. I understand you did it, Mr. Blonder?

Mr. Blonder: I did, your Honor, and there was a reason for doing it at the particular time.

The Referee: I don't care about that. [195]

Mr. Seymour: There were no subpoenas——

The Referee: Never mind. They did the work. Do you deny that?

Mr. Seymour: I do.

The Referee: Then they didn't do it?

Mr. Seymour: They didn't. That is my opinion.

Mr. Blonder: We did do it. Every one of these witnesses were examined under 21a.

The Referee: He says you didn't and you say you did.

Mr. Blonder: Let the record speak for itself. It is in the record. What else can I say?

Mr. Seymour: There is just two witnesses examined.

Mr. Blonder: What?

Mr. Seymour: Or there was.

The Referee: Do you know anything about it, Mr. Chichester?

Mr. Chichester: I was present when the witnesses were examined. I can name about three or four here now.

Mr. Blonder: Mr. Keats, Mr. Laughlin. They are all here.

The Referee: Go ahead and explain your theory then.

Mr. Blonder: I would like to explain the Trustee's theory. I was wondering whether the Court before we set up our defense would be interested in hearing from the petitioner.

The Referee: That is all right.

Mr. Blonder: If I start now I may anticipate the [196] situation.

Mr. Shutan: Well, your Honor, to clear the air a little bit, this is brought before the Court, as you are well aware, on a petition by Bill Lepper Motors upon the Trustee to show cause why we should not be paid the balance which we claim to be owing on the trust deed.

Now, I don't think at this time there is any question by anybody as to the sale of the real property through this Court by the Trustee, and confirmed by the Court.

Now, so that all the parties who are interested—now, Mr. Seymour and Mr. Gage have throughout these proceedings expressed themselves as very interested. For that reason, when I brought this petition and order to show cause, I caused to be served upon both Mr. Seymour and Mr. Gage copies of the petition and order to show cause, and these copies included a paragraph requiring a written answer. The answer was a motion brought by Mr. Seymour and Mr. Gage to dismiss. I am not going to go into that because I believe the Court has already disposed of the position of those creditors other than the Trustee in bankruptcy.

Now, I would like to call Mr. Fesler of the Title Insurance & Trust Company to the stand for the

purpose of introducing the documents in question.

Mr. Blonder: Don't you want to just make a statement so I can tell the Court my position?

Mr. Shutan: Our position, our statement is simply [197] this, that we hold a promissory note secured by a deed of trust, by assignment from the Reconstruction Finance Corporation, the balance upon which, including certain charges and proper allowances, and after deducting for certain receipts which we have credited the estate with, we claim a balance due of $64,934.07, as set forth in Exhibit A to the Bill Lepper Motors petition.

The Referee: Yes.

Mr. Shutan: Which is the subject of this hearing; and there have been certain answers filed. If I can interpret the Court's attitude on the answer filed by Mr. Seymour and Mr. Gage as not being properly before the Court, I won't take the time——

The Referee: Well, it is properly before the Court but I am just saying that I am not going to permit any creditor to come in here and assume the functions of the Trustee unless it is done in accordance with Judge Jenney's decision.

Mr. Shutan: Then there is no necessity of my answering their answer?

The Referee: I don't think there is.

Mr. Shutan: Because if there is I would like to request the Court for permission to make several oral motions.

The Referee: We don't want to clutter up the record with motions. It is clear to me. It is just

whether the Trustee has any defense to your petition.

Mr. Shutan: Then I think I should be permitted to go [198] forward and show our prima facie case, and then permit the burden of showing why the Trustee should not pay to be assumed by the Trustee.

The Referee: What is the objection to that?

Mr. Blonder: None at all. I might state this, that perhaps the Court would like to hear our theories.

The Referee: All right, let's have that.

Mr. Blonder: The Trustee has several theories set up in our answer, and if I may I would like to present them perhaps in the inverse order in which they are set up, because——

The Referee: When was that answer filed, so I can find it?

Mr. Blonder: Right after the petition, very shortly after that.

The Referee: Oh, I have it here. It was filed September 25, 1951.

Mr. Blonder: Yes, prior to the last hearing.

The Trustee's theories are as follows, very briefly:

The first theory of the Trustee is that when Bill Lepper Motors foreclosed upon their chattel mortgage they thereby waived their lien on the real estate.

That is stating the theory very simply. That is under the theory of law that when you have a debt secured by several encumbrances, by electing to foreclose upon one of them the party holding the

encumbrance thereby waives his [199] lien upon the other property.

The Referee: Well now, what authority have you got for that?

Mr. Blonder: We have—incidentally, on these various points I will ask permission of the Court to submit a more formal brief, if we can.

The Referee: I know, but give them to me now.

Mr. Blonder: All right, we have several California cases now. One is Citizens National Bank——

The Referee: Just write the citations down and I will have my secretary get them for me.

Mr. Blonder: Well, we have several, your Honor.

The Referee: That is all right. Write them down on a piece of paper and I will have my secretary get them.

Mr. Seymour: Can we have some, too?

Mr. Shutan: You mean you don't have them?

Mr. Seymour: No.

The Referee: All parties can have them. I will be the first and then I will pass them on.

Mr. Blonder: Shall I proceed, your Honor?

The Referee: No, just wait until I get them. I want to settle one thing at a time. Let me have that list now. Go ahead now.

Mr. Blonder: The next theory which the Trustee would like to present is the theory of merger.

The evidence will develop that there were two situations [200] here in which there may have been a merger. When Bill Lepper Motors acquired the trust deed and the chattel mortgage from Recon-

struction Finance Corporation, there will be certain evidence which will show that perhaps Bill Lepper Motors at that time was acting on behalf of and as the agent for Superior Casting, and therefore that there may be a merger at that point.

The Referee: We brought that out in some other hearing, didn't we?

Mr. Blonder: Well, we had a discussion on that point in the 21a examinations, and incidentally, your Honor will recall that was a 21a examination.

The Referee: Did I hear that 21a examination?

Mr. Blonder: Yes. Well, we conducted it in another room but the witness refused to answer questions.

The Referee: I remember now.

Mr. Blonder: Another point in the transaction where the question of merger arises, and it is probably a stronger one than that one, is that the purchaser, Mr. Hugo Aleidis, was acting for and on behalf of Bill Lepper Motors, and consequently when Bill Lepper Motors acquired title here, the two estates, the greater and lesser estate here, were merged, so they wiped out the foreclosure lien.

That is the other theory on which the Trustee relies to completely disallow, disallow entirely the Bill Lepper Motors claim. [201]

The Referee: Have you got authorities on that?

Mr. Blonder: Yes, your Honor.

The Referee: All right, write those down and pass them on.

Mr. Blonder: Shall I proceed, your Honor?

The Referee: Yes, go ahead. That is all right.

Mr. Blonder: Now, the Court may feel that these two theories are not proper. We think they are, but the Court may refuse to subscribe to our contention that the entire claim should be disallowed. If that does appear, the Trustee then feels and will present evidence to show that the foreclosure of the chattel mortgage was improper. In fact, it will probably develop that it can be said that the foreclosure of the chattel mortgage was probably fraudulent insofar as creditors are concerned, and the evidence will show——

The Referee: In what respect?

Mr. Blonder: I will explain. The evidence will show that at the foreclosure sale, the chattel mortgage foreclosure, there were certain people there willing to bid upon the property. It was a purported public sale; that these individuals were prepared to perhaps go as high as eight or nine thousand dollars; that Bill Lepper Motors, Inc., acting through Consolidated Casting Company, approached these individuals who were willing to bid on this property, persuaded them not to bid, paid them $1,000 in order not to bid, [202] and consequently, having gotten rid of the competition, the property was sold to Consolidated for $1,500; and the evidence will show that the value of that property was of the value of approximately $20,000.

Consequently, if the Court disagrees with us in disallowing the claim completely, we at least claim an offset of at least $20,000.

The Referee: Well, isn't there some claim that the chattel mortgage was not recorded in time and

so on, that there is some defect in the mortgage itself,—I mean as against creditors?

Mr. Blonder: No. There will be perhaps some claim that the method of foreclosure, such as posting of notice and the necessary notice as required by law is defective; but insofar as the recording of the original chattel mortgage itself, which incidentally was handled through the Reconstruction Finance Corporation, there is no evidence that that was defective.

Shall I proceed, your Honor? We have two other points.

The Referee: Yes, go ahead.

Mr. Blonder: We believe that the evidence will also show that at the foreclosure sale, or subsequently thereto, Bill Lepper Motors, Inc., through Consolidated Casting took over certain supplies and other assets not covered by the mortgage which in effect constituted a conversion. The value of that property is approximately $5,000, and the [203] Trustee should get the benefit of that as an offset against the Bill Lepper claim.

The Referee: I see.

Mr. Blonder: Now, in the event the Court disagrees with us on all of these theories, we have still set up the point of estoppel, which point is this, very briefly; at the time the property was sold here in court the Court specifically asked Bill Lepper Motors, through Mr. Shutan, to state definitely how much was due and owing to them; and based upon the figure given to the Trustee at that time, the Trustee computed the administration costs and

other costs and computed the minimum figure he should take for the property was $75,000. The Trustee said he could take $75,000, relying upon the statement of Bill Lepper Motors that they had a certain amount of money coming to them. The amount they are seeking at the present time is several thousand dollars more than they stated in court at that particular time; and therefore we feel that the Court should—we feel that if the Court should disagree with all of these other theories we should at least have Bill Lepper Motors limited to the amount they stated in court, and the Trustee should also be given a credit of $589 which the Trustee had to pay out on account of Bill Lepper Motors to close the escrow.

Those are matters which will be brought out in the evidence.

Those, very briefly, are the theories of the Trustee. [204]

The Referee: Well now, you go ahead, Mr. Shutan.

Mr. Shutan: Well, without any further statements, your Honor, except one, I would like to go forward because I feel that we have finally reached a point where we are now going to be heard; and I would just like to remind the Court that this is the fifteenth time I have appeared in this court for the purpose of being heard on this thing.

The Referee: Never mind that. Just go ahead.

Mr. Seymour: Your Honor, could I have a moment?

The Referee: Yes.

Mr. Seymour: The Trustee, I understand, has enumerated his defenses to that trust deed and to the chattel mortgage. Now, on behalf of the creditors that have filed an answer here I would like to point out two theories of law——

The Referee: I am not going to hear you on behalf of creditors unless the Trustee wants to collaborate with you. You point them out to him and if he wants to adopt them, all right, it is all right with me; but I am going to follow Judge Jenney's decision which is binding on me. The Trustee is in charge of this case and creditors are not entitled to be heard unless the Trustee fails to perform his duty. In other words, we will have nothing but a jumble here all the time.

Mr. Seymour: We did make demand upon the Court——

The Referee: Well, if you have any theories, give them to him, and if you don't think he is performing his [205] duty with respect to them, then that is entirely different. Then I will hear you again.

Mr. Seymour: Your Honor, there has been filed before this Court a document which if it be correct in my opinion makes an adverse interest between the counsel for the Trustee and these persons.

The Referee: All right, I don't care about your opinions. You have got to point that out by some proceeding. I am not going to permit you to come in and ball up this proceeding, Mr. Seymour, unless there is a ground for it.

Has anybody got that 182 California? I had it here a minute ago.

Well, all right. If you have any theories of any kind, or any cases, give them to the Trustee and then if you think he isn't doing his duty, call it to my attention.

Go ahead, now.

Mr. Shutan: All right, Mr. Fesler.

The Referee: How many witnesses do you have?

Mr. Shutan: I just have two.

The Referee: Have them both stand up at the same time. How many have you got, Mr. Blonder?

Mr. Blonder: Six, your Honor.

The Referee: Have them all stand up.

(All witnesses were sworn.) [206]

L. W. FESLER

called as a witness on behalf of Bill Lepper Motors, Inc., being first duly sworn, testified as follows:

Direct Examination

By Mr. Shutan:

Q. By whom are you employed, Mr. Fesler?

A. The Title Insurance & Trust Company.

Q. And what department?

A. The Trust Deed Division.

Q. And do you have custody of certain records in the Trust Deed Division of the Title Insurance & Trust Company? A. I do.

Q. Are you familiar with the file of Superior Casting Company and Bill Lepper Motors?

A. I am.

(Testimony of L. W. Fesler.)

Q. Do you have certain documents with you which you have brought in connection with that file?

A. I do.

Q. Do you have an original promissory note between Superior Casting Company and Reconstruction Finance Company dated April 14, 1947, in the face amount of $100,000? A. I do.

Mr. Shutan: I would like to have this—your Honor, I am going to introduce certain documents for exhibits first, and I have agreed with the Title Company that it will be [207] satisfactory to Bill Lepper Motors to make an arrangement to have these photostated and have the originals returned to the Title Company.

The Referee: I think that is all right.

Mr. Blonder: You say you are going to have photostats of them?

Mr. Shutan: That is right, and have the originals returned.

Mr. Blonder: As far as I am concerned, if you have the photostats now why don't you introduce the photostats?

Mr. Shutan: We don't have the photostats now. I have copies which I have submitted to you, and possibly by stipulation we can save some of this effort. I don't understand that the Trustee challenges the due execution of these original documents.

Mr. Blonder: I would say that the Trustee does not challenge it.

Mr. Shutan: Maybe we can make certain stipulations here.

(Testimony of L. W. Fesler.)

The Referee: Go ahead now.

Mr. Shutan: Well, I will ask this to be marked as Petitioner's Exhibit No. 1.

The Referee: All right, so received and so marked.

PETITIONER'S EXHIBIT No. 1

Los Angeles, California
April 14, 1947.

"$100,000.00

For value received, the undersigned promises to pay to the order of Reconstruction Finance Corportation, hereinafter called 'Payee' at the Los Angeles Branch of the Federal Reserve Bank of San Francisco in the City of Los Angeles, State of California One Hundred Thousand and No/100 Dollars, (Write out amount) with interest on unpaid principal computed from the date of each advance to the undersigned at the rate of 4 per cent per annum, payment to be made in installments as follows: * * * This note is secured by mortgage of chattels and deed of trust of even date herewith."

* * *

SUPERIOR CASTING
COMPANY, INC.,
/s/ V. W. LAUGHLIN,
/s/ FRANK D. ANDERSON,
By /s/ FRANK D. ANDERSON,
President.

(Testimony of L. W. Fesler.)

/s/ MRS. GENELL LAUGHLIN,

/s/ MARY ANDERSON,

By /s/ BEN E. EASTMAN,
Secretary-Treasurer.

[Endorsed]: Filed October 2, 1951. [208-A]

Q. (By Mr. Shutan): Mr. Fesler, do you have in your possession as part of that file an original document entitled deed of trust, dated the 14th of April, 1947, between [208] Superior Casting Company as Trustor and Title Insurance & Trust Company as Trustee, and Reconstruction Finance Corporation as Beneficiary? A. I do.

Mr. Shutan: I would like to have this document marked Petitioner's Exhibit No. 2.

The Referee: All right.

PETITIONER'S EXHIBIT No. 2

"Deed of Trust

This Deed of Trust, made this 14th day of April, 1947, between Superior Casting Company, Inc., a California Corporation, whose address is 1601 El Segundo Boulevard, El Segundo, California (hereinafter called the "Trustor"), and Title Insurance and Trust Company, a corporation of the County of Los Angeles, California, and its successors in trust (hereinafter called the "Trustee"), and Reconstruc-

(Testimony of L. W. Fesler.)

tion Finance Corporation, a corporation created and existing under the laws of the Congress of the United States, having its main office at Washington, D. C., (hereinafter called the "Beneficiary");

Witnesseth: That, whereas, the maker of the note hereinafter mentioned is indebted to the Beneficiary in the sum of One Hundred Thousand and No/100 Dollars ($100,000.00) and has agreed to pay the same, with interest, according to the terms of a certain promissory note, copy of which is hereto attached, marked Exhibit "A," and hereby made a part hereof. Hereafter the word "note," wherever used, shall include "notes" as required. * * *"

* * * In Witness Whereof, Trustor has duly executed these presents by Frank D. Anderson, its President, attested by Ben E. Eastman, its Secretary-Treasurer, and caused its corporate seal to be hereto affixed the day and year first above written.

SUPERIOR CASTING
COMPANY, INC.,

By Frank D. Anderson,
President.

Attest: Ben E. Eastman, Secretary-Treasurer.

* * *

Recorded at request of Title Insurance & Trust Co., May 2, 1947, 8 a.m.

Copyist #1. Compared, Mame B. Beatty, County Recorder by E. Kingsley, Deputy.

[Endorsed]: Filed May 2, 1947. [209-A]

(Testimony of L. W. Fesler.)

Q. (By Mr. Shutan): Mr. Fesler, do you have in your possession as part of the aforesaid file an original document entitled "Assignment of Deed of Trust," dated October 13, 1950, in favor of Bill Lepper Motors, a California Corporation, and signed by Reconstruction Finance Corporation by Ray C. Pavey? A. I do.

Mr. Blonder: Let me see that.

Mr. Chichester: What is the date of that?

Mr. Blonder: April 13, 1950.

Mr. Shutan: I ask that this be marked Petitioner's Exhibit No. 3, if the Court please.

The Referee: All right.

PETITIONER'S EXHIBIT No. 3

Inst. No.....

Assignment of Deed of Trust

For Value Received, the undersigned hereby grants, assigns and transfers to Bill Lepper Motors, a California corporation, all beneficial interest under that certain Deed of Trust dated April 14, 1947, executed by Superior Casting Company, Inc., a California corporation, Trustor, to Title Insurance and Trust Company, a corporation, Trustee, and recorded May 2nd, 1947, in Book 24521, Page 242 of the official records in the office of the County Recorder of Los Angeles County, California;

Together With the note therein described or referred to, the money due and to become due thereon,

(Testimony of L. W. Fesler.)

with interest, and all rights accrued or to accrue under said Deed of Trust.

Dated this 13th day of October, 1950.

RECONSTRUCTION FINANCE CORPORATION,

By /s/ RAY C. PAVEY,
Attorney-in-Fact.

State of California,
County of Los Angeles—ss.

On this 13th day of October, A.D. 1950, before me, Kay H. Backus, a Notary Public in and for the said County and State, personally appeared Ray C. Pavey, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of Reconstruction Finance Corporation, and acknowledged to me that he subscribed the name of Reconstruction Finance Corporation thereto as principal and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ KAY H. BACKUS,
Notary Public in and for the said County and State.

My commission expires March 10, 1954.

[Endorsed]: Filed October 2, 1951.

(Testimony of L. W. Fesler.)

Q. (By Mr. Shutan): And, Mr. Fesler, do you have in your possession as part of the aforesaid file a document entitled "Notice of Default and Election to sell under Deed of Trust," dated November 10, 1950, on behalf of Bill Lepper Motors on the notice, being to Superior Casting Company as Trustor?

A. I do. [209]

Mr. Shutan: I would like to have this marked as Petitioner's Exhibit No. 4, if the Court please.

The Court: All right, that will be done.

PETITIONER'S EXHIBIT No. 4

Trust Order No. 50-8423

Notice of Default and Election to Sell Under Deed of Trust

Notice Is Hereby Given:

That Title Insurance and Trust Company, a corporation, is Trustee under a deed of trust dated April 14th, 1947, executed by Superior Casting Company, Inc., a corporation, as Trustor, to secure certain obligations in favor of Reconstruction Finance Corporation, a corporation, as Beneficiary, recorded May 2, 1947, in Book 24521, page 242, of Official Records in the office of the Recorder of Los Angeles County, California, describing land therein as:

> Lots 296 to 300, inclusive, in Block 123 of El Segundo Tract in the City of El Segundo, as per map recorded in Book 22, pages 106 and 107 of maps in the office of the County Recorder of said county;

said obligations including one note for the sum of $100,000.00.

That the beneficial interest under such deed and the obligations secured thereby have been transferred to the undersigned;

That a breach of, and default in, the obligations for which such deed is security has occurred in that payment has not been made of:

The installments of interest which became due on May 14, 1950, June 14, 1950, and July 14, 1950;

The installment of principal plus interest which became due on August 14, 1950, and all subsequent installments of principal plus interest;

That by reason thereof, the undersigned, present beneficiary under such deed, has executed and delivered to said Trustee a written Declaration of Default and Demand for Sale, and has deposited with said Trustee such deed and all documents evidencing obligations secured thereby, and has declared and does hereby declare all sums secured thereby immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby.

Dated November 10, 1950.

[Seal] BILL LEPPER MOTORS,

By /s/ WM. S. LEPPER,
President.

By /s/ VIVIAN S. LEPPER,
Secretary.

(Testimony of L. W. Fesler.)

State of California,
County of Los Angeles—ss.

On November 10, 1950, before me, the undersigned, a Notary Public in and for said County and State, personally appeared William S. Lepper, known to me to be the President, and Vivian S. Lepper, known to me to be the Secretary of the Corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

Witness my hand and official seal.

[Seal] /s/ HAROLD J. ACKERMAN,
Notary Public in and for said
County and State.

Space Below for Recorder's Use Only

Document No. 3887. Recorded at request of Title Insurance and Trust Co., November 10, 1950, Book 34780, page 403, Official Records.

County of Los Angeles, California.
Fee $1.90.

MAME B. BEATTY,
County Recorder,

By /s/ I. KLOTZER,
Deputy.

(Testimony of L. W. Fesler.)

This notice must be recorded by Title Insurance and Trust Company only.

When recorded mail to Title Insurance and Trust Company, Trust Deed Division, 433 S. Spring Street, Los Angeles 13, California.

Recorded November 10, 1950.

[Endorsed]: Filed October 2, 1951.

Q. (By Mr. Shutan): Mr. Fesler, do the records in your file—strike that. Can you tell us the circumstances under which those documents were placed in the possession of your company?

A. They were placed in our possession by a letter from Bill Lepper, William Lepper, on November 8, 1950, where he enclosed the deed of trust together with the assignment, and asked that notice of default be given.

Q. And was such notice of default given as per those instructions of Mr. William S. Lepper for Bill Lepper Motors?

A. Yes, the papers, notice of sale and election of default, together with declaration of default, were sent out to his attention on November 9th for execution, which he so did and returned to us on November 10th, at which time we filed the notice of default and election to sell.

Q. On November 10, 1950? A. Yes.

(Testimony of L. W. Fesler.)

Q. You filed that with the County Recorder of Los Angeles County? A. We did.

Mr. Shutan: I have no further questions of this witness. [210]

Cross-Examination

By Mr. Blonder:

Q. Mr. Fesler, did you handle for the title Insurance & Trust Company the sale of this real property by the Trustee to Mr. Hugo Aleidis?

A. No, we did not. We merely entered the escrow.

Q. You did what?

A. We entered the escrow with our demand for our fees and expenses.

Q. Will you give us a breakdown of what your fees and expenses were that you submitted in the escrow?

A. The Trustee's fee was $420; registered mail, $1.32; recording of the notice of default, $1.90; advertising the notice of sale, $25; posting of the property, $10; various postponements from time to time, $20, 8 at $2.50 each; foreclosure sale guarantee, $105; which gives a total sum of $583.22.

Q. The $420 which you designated as Trustee's fee, can you explain to us what that is?

A. That fee is the Trustee's fee which is based upon, in this case, approximately 1⅓ per cent of the amount of the beneficiary's claim.

Q. And is the Trustee in this particular situation the Title Insurance & Trust Company?

(Testimony of L. W. Fesler.)

A. It is.

Q. And as I understand it, the Trustee in Bankruptcy, [211] Mr. Frank Chichester, did pay to the Title Insurance & Trust Company that $583.22; is that correct?

Mr. Shutan: I don't understand. Is this by way of cross-examination?

Mr. Blonder: Yes. Well, if you want me to put him on in chief, I don't care.

Mr. Shutan: I have no objection, your Honor, except it doesn't seem to be proper cross-examination relating to anything I brought out.

Mr. Blonder: Well, your Honor, as long as this witness is here, I explained to the Court that if the Court disallows all our theories we still have that one last thought of estoppel, and the Trustee paid out that $583.22 which we think we are entitled to. Otherwise I can put him on as my own witness, but then he will have to come back.

The Referee: No, you don't have to do that.

Q. (By Mr. Blonder): I think the question is whether the Trustee in Bankruptcy, Mr. Frank Chichester, has paid to the Title Insurance & Trust Company the sum of $583.22 which you mentioned?

A. We had on deposit originally from the beneficiary the sum of $100 to apply against the ultimate expenses. The balance of that $583.22, being $483.22, was paid to my department by Mr. John Butler, an escrow officer of my company, through their Order 3479591.

Q. Did you put a demand in that escrow on be-

(Testimony of L. W. Fesler.)

half of [212] the Title Insurance & Trust Company for the $583.22? A. We did.

Q. But from what you tell me you did not get the $583.22; is that right?

A. We placed a demand—I quote here from our department to Mr. Butler in our Escrow Department——

Q. Is that your No. 508423? A. It is.

Mr. Shutan: I will stipulate you paid it if you tell me you did.

Mr. Chichester: I paid $589.22.

Mr. Shutan: If you tell me you paid it, all right.

Mr. Blonder: Will you stipulate it was paid on behalf of Bill Lepper Motors?

Mr. Shutan: No, not on behalf of Bill Lepper Motors.

Mr. Blonder: That is the important thing. He didn't pay it for himself.

Q. (By Mr. Blonder): I will state to you, Mr. Fesler, that our records indicate the Trustee here paid $589.22. Can you make that jibe with your figures?

A. We made a demand into the escrow by this letter here, that we placed a full reconveyance, that they could use the full reconveyance when they could comply with the instructions of Bill Lepper Motors and when they could pay to us our Trustee's fees and expenses.

Q. And your Trustee's fees and expenses you say [213] were $583.22, is that right, which you were paid out of the escrow?

(Testimony of L. W. Fesler.)

A. We were paid out of the escrow $586.72. I believe there was during that escrow a postponement that was made of $2.50.

Q. That brings it up to $589.22, then, or very close.

Mr. Shutan: It should be exact, the same company representing both pieces of paper.

Q. (By Mr. Blonder): Do you have an additional charge—I mean do you show that you obtained a——

A. There is a letter from Mr. A. A. Martin who is one of our trust officers stating that they could use the full reconveyance when they could pay the Trustee's expenses in the sum of $586.72.

Q. At any rate, your present testimony, Mr. Fesler, is that the Title Insurance & Trust Company received the sum of $586.72 out of the escrow as their Trustee's fees and expenses for the foreclosure proceedings that they had taken on the trust deed which you have described; is that correct?

A. We received $586.72 as demanded, together with an additional $2.50 postponement fee.

Q. So you got a total of $589.22?

A. That is right.

Q. And you got that money for the things that I just mentioned in my last question; is that right, Mr. Fesler? [214] A. That is correct.

Mr. Blonder: No further questions. That is all.

Mr. Shutan: That is all. Thank you, Mr. Fesler. May this witness be excused?

(Testimony of William S. Lepper.)
(Testimony of L. W. Fesler.)

Mr. Blonder: Yes, as far as we are concerned.

Mr. Shutan: Thanks a lot, Mr. Lepper.

The Referee: This witness doesn't have to remain, does he?

Mr. Blonder: No, your Honor, not as far as the Trustee is concerned.

WILLIAM S. LEPPER

called as a witness on behalf of Bill Lepper Motors, Inc., being first duly sworn, testified as follows:

Direct Examination

By Mr. Shutan:

Q. Mr. Lepper, your full name is William S. Lepper? A. Yes.

Q. And are you an officer of Bill Lepper Motors, Inc.? A. I am.

Q. Is that a corporation? A. It is.

Q. What is your office? A. President.

Q. Were you the president of Bill Lepper Motors, [215] Inc., during all of 1950?

A. Yes.

Q. And have you remained so to the present?

A. Yes.

Q. In your capacity as an officer of Bill Lepper Motors, Inc., are you familiar with the transaction whereby that corporation entered into a transaction with the Reconstruction Finance Corporation?

A. I am.

Q. I show you here Petitioner's Exhibit No. 1, being a promissory note of April 14, 1947, in the

(Testimony of William S. Lepper.)

face amount of $100,000 in favor of Reconstruction Finance Corporation and signed by Superior Casting Company. Have you seen that note before?

A. I have.

Q. What was the occasion on which you first saw that note?

The Referee: Just a minute. Mr. Blonder, weren't you going to give me a list of cases on merger?

Mr. Blonder: I did, your Honor. One of those was entitled "Merger."

The Referee: Oh, excuse me. All right.

Mr. Shutan: Mr. Reporter, will you read my last question to the witness?

(Record read as follows:)

("Q. What was the occasion on which you first saw that note?") [216]

The Witness: Oh, I believe it was when I originally took over the assignment.

Q. (By Mr. Shutan): Did Bill Lepper Motors purchase this promissory note from Reconstruction Finance Corporation? A. Yes.

Q. I show you Petitioner's Exhibit No. 2, being a deed of trust dated the 14th of April, in the amount of $100,000 or indicating that it secures a note in the amount of $100,000, between the same parties. Have you seen that before?

A. I believe I have.

Q. Was that in connection with the same trans-

(Testimony of William S. Lepper.)

action between your corporation and Reconstruction Finance Corporation? A. Yes.

Q. And did you handle the negotiations between Bill Lepper Motors—— A. Yes.

Q. And did you arrange for the purchase of this note or the purchase of this deed of trust and the promissory note and a chattel mortgage from Reconstruction Finance Corporation? A. I did.

Q. Were you informed as to the balance owing at the time of the purchase? A. Yes. [217]

Q. I show you an endorsement on the reverse side of the original promissory note, Petitioner's Exhibit 1—see if I read this correctly—"Principal amount of note unpaid as of October 13, 1950, is $59,390 with inferest from April 14, 1950. Pay to the order of William S. Lepper Motors without recourse, representation or warranty of any kind. Reconstruction Finance Corporation, by Ray C. Pavey, Assistant Manager."

Did you receive this endorsement on this note from the Reconstruction Finance Corporation?

A. Yes, sir.

Q. And did you pay to Reconstruction Finance Corporation at that time the amount necessary to cover this principal and unpaid interest?

A. I did.

Q. And what was the amount which you paid?

A. The amount that I paid was—if I remember correctly, $60,600.

Q. And the difference between $59,390 and $60,600, was that the interest?

(Testimony of William S. Lepper.)

A. That was the interest.

Q. From April 14, 1950, until the date you paid?

A. Right.

Q. What was the date which you paid?

A. October 13th, I believe.

Q. 1950? [218]

A. Yes. I have the cancelled check.

Q. How did you pay, in what manner?

A. I have a check here which was dated on that date.

Q. This is a check on the Hollywood State Bank made payable to the Hollywood State Bank in the amount of $60,600, signed by Bill Lepper Motors, Inc., by William S. Lepper, and dated 10-13-50. How did you use that check in this transaction?

A. I purchased a cashier's check with it. They asked that I bring a cashier's check.

Q. And you turned over that cashier's check to the Reconstruction Finance Corporation on or about the 13th day of October, 1950?

A. The same day.

Q. And at that time is it true you received the promissory note and mortgage and deed of trust and this assignment of deed of trust which we now identify as Petitioner's Exhibit 4; is that correct?

A. If I remember correctly, yes.

Mr. Shutan: I would like to introduce all of these—I would like to introduce the promissory note, Petitioner's Exhibit 1, into evidence.

The Referee: Haven't you already described it in the record?

(Testimony of William S. Lepper.)

Mr. Shutan: Yes, but I haven't offered it in evidence yet, your Honor. [219]

The Referee: You don't have to do that. It is in the record. I don't like to encumber the record unnecessarily. Now, if you have already brought out in the testimony the substance of that, there is no need of putting it in here. Is there anything in there that you haven't brought out that you want?

Mr. Shutan: No, sir, I believe you are correct on that.

Mr. Blonder: I may tell the Court, however, that the Court may find the actual original documents of interest in considering the Trustee's theory that there was one loan, two mortgages, and one transaction. That may be of interest to the Court, to see the original documents on that.

The Referee: All right.

Mr. Shutan: Here is the original promissory note, together with the endorsement of the assignment thereon.

Here is the original deed of trust, Petitioner's Exhibit No. 2, which I will offer in evidence.

The Referee: That is in evidence already.

Mr. Shutan: Here is the assignment of the deed of trust, Petitioner's Exhibit No. 4, which I offer in evidence.

The Referee: That is in evidence already.

Mr. Shutan: And I would like to offer as additional evidence the check of——

The Referee: These are all in evidence, Mr.

(Testimony of William S. Lepper.)

Shutan. Now you want to put the check in? [220]

Mr. Shutan: Yes, sir.

The Referee: What is the use of that?

Mr. Shutan: All right, sir.

The Referee: The others are in evidence already.

Mr. Chichester: Isn't the check in?

Mr. Shutan: No. The testimony on it is.

Then, if the Court please, I think it probably would be better for the record if this check were in the Court's hands as offered evidence.

The Referee: How would it be better for the record? The record is there. You have got it all in.

Mr. Shutan: Well, I offer it, your Honor.

The Referee: Well, I don't see any necessity for it. I am not going to encumber this record uselessly.

Mr. Shutan: All right, sir.

Q. (By Mr. Shutan): Mr. Lepper, in your petition seeking to have the Trustee required to pay over to you certain moneys which you claim due under this deed of trust, you have an exhibit to that petition in which you set forth six items for which you claim to be entitled to be reimbursed. The first item was the amount paid to Reconstruction Finance Corporation, $60,600, which we have covered.

The second item, you claim to have paid apparently the sum of $2,657.08, Los Angeles County taxes. Now, were these taxes of Superior Casting Company or taxes upon the real or personal property at Superior Casting Company? [221]

A. Yes.

(Testimony of William S. Lepper.)

Q. Then when were they paid?

A. I can't tell you the exact date. I have the paid tax bills here, however, and the date on which they are stamped.

Q. Well——

A. That was one that seemed to be——

The Referee: Don't forget, gentlemen, if this case goes to the Circuit Court of Appeals your transcript expense is going to be enormous if you just put in a lot of stuff like this that doesn't serve any purpose if you have it in the record already. It all has to be printed and it will cost you several hundred dollars to get all this stuff in.

Go ahead.

Q. (By Mr. Shutan): Did you pay a certain—strike that. Did you pay certain County taxes on behalf of Superior Casting Company on December 5, 1950? A. I did.

Q. What did you pay on that date to Los Angeles County?

A. Well, these are the tax bills here. I don't have a total in front of me but you have it listed there. And then on the——

Q. Well, what does this one show, for example (indicating)?

A. Well, this one is for equipment that is located [222] at Mr. Gage's client's place of business.

Q. What does it show?

A. It had to be paid.

Mr. Gage: That is a conclusion of the witness.

(Testimony of William S. Lepper.)

There is no showing that there is any equipment at my client's place of business.

The Witness: This is his address on here, put it that way.

Mr. Gage: I move the witness' answer be stricken as not responsive.

The Referee: I am not going to hear from you. Motion denied. If the Trustee wants to make that, all right. You have to work through the Trustee, unless you show the Trustee isn't doing his duty.

Q. (By. Mr. Shutan): Let's refer to these tax statements one at a time. This one is addressed to Superior Casting Company, 5717 South District Boulevard; is that correct?

A. That is correct.

Q. And it is in the amount of $25.60?

A. That is correct.

Q. And Bill Lepper Motors paid that bill on December 5, 1950? A. Right.

Q. Now we take the next one. It says Superior Casting Company, 1601 El Segundo Boulevard, El Segundo, California, trade fixtures 5717 South District Boulevard. [223] A. That is correct.

Q. And it shows a total of taxes on this 1950 bill of $113.57. I see an indication of a paid stamp here on December 5, 1950. Was that $113.57 paid by Bill Lepper Motors, Inc.? A. It was.

Q. Now, the next bill, assessed to Superior Casting Company, 1601 El Segundo Boulevard, El Segundo, California, on real property, El Segundo, Lots 296, 297, 298, 299, and it has a number of other

(Testimony of William S. Lepper.)

—a lot of other reading to which we will not refer at the moment. This is a 1950 tax bill, and the total it indicates here is $2,513.52. Now, is this the tax bill, as far as you know, on the real property and improvements at Superior Casting? A. It is.

Q. And did Bill Lepper Motors to your knowledge, the corporation, Bill Lepper Motors, Inc., pay this on December 5, 1950? A. It did.

Q. Were these payments——

The Referee: Do you want to see them?

Mr. Blonder: Yes, before they go in evidence, if you are going to put them in we would like to see them.

Q. (By Mr. Shutan): I show you one other tax bill, 1950, Superior Casting Company, solvent credits, in the total amount of $4.39, marked paid June 29, 1951. Did Bill Lepper [224] Motors pay this? A. Yes.

Mr. Blonder: And what was that tax bill on, Mr. Shutan?

Mr. Shutan: It says "solvent credits." I believe that was on some bank account of Superior Casting, $4.39.

Q. (By Mr. Shutan): Now, the next item which you list here is legal expense, legal services as of December, 1950, $743. A. That is right.

Q. Have you paid this sum? A. I have.

Q. To whom did you pay?

A. To Mr. Ackerman, Mr. Harold Ackerman.

Q. And Mr. Ackerman represented you in connection with what matter?

(Testimony of William S. Lepper.)

A. In connection with this purchase and sale and so forth of this property.

Q. In connection with the——

A. The properties in question.

Q. I see. Now, you have another item here of $618, ventilators for building? A. Yes.

Q. Is that ventilators which you put into the improvements at Superior Casting Company?

A. Yes, that was put into the building. [225]

Q. When were those put in?

A. Those were put in—I don't know the exact date they were put in. They were put in sometime in December, however.

Q. Of 1950? A. Yes.

Q. And at whose instance were they put in?

A. Well, mine.

Q. You mean the corporation?

A. I gave authority to put it in, yes.

Q. Those ventilators, what is the nature of those? Are they attached to the property?

A. To the building, yes. They took the fumes out of the building, mainly because the tenant on the other side of the building from the foundry was complaining about the fumes and so forth coming through.

Q. And who was the company or contractor or individual that you paid that money to?

A. It was paid to the Slauson Avenue Sheet Metal Works.

Q. The $618? A. Yes.

Q. I see. Now, you have an item of $791.20 for

(Testimony of William S. Lepper.)

insurance. Was that insurance which Bill Lepper Motors paid for the property of the Superior Casting Company?

A. That was insurance that came due on the property [226] and had to be renewed. I paid it.

Q. What type of insurance was that?

A. Fire insurance.

Q. Was that all fire insurance? A. Yes.

Q. And for what period was that insurance coverage?

A. Well, I think it was a three-year period. I don't know the exact date when it took place, but I am sure that the papers on the property and all would be in the hands of the Trustee. He no doubt has all that because I am sure a refund was probably made at the time of the purchase of the property.

Q. And Bill Lepper Motors paid $791.20 to the insurance broker? A. That is right.

Q. Now, then, you also claim interest of $2,144.79 as of the date of this exhibit? A. Right.

Q. Is that correct? A. Yes.

Q. Now, that is based upon the unpaid interest accruing on your promissory note which you took from the Reconstruction Finance Corporation from the date that interest was last paid; is that correct?

A. That is right.

Q. And that is figured in accordance with the terms [227] of the note? A. That is right.

Mr. Chichester: For the record, Mr. Shutan, is

(Testimony of William S. Lepper.)

that October 15, 1950, that you compute interest, so we will know where we are?

The Witness: Yes, October 13, 1950, if I am not mistaken, until September 13th of this year.

Mr. Shutan: No—well, yes, no interest had been paid by Superior Casting from April, 1950.

The Witness: I paid that in the purchase of the building, the purchase of the——

Mr. Shutan: However, I would say this, our original $60,600 includes our claim of interest from April until October 13th, that is correct, so we are only claiming additional interest from October 13th.

Mr. Chichester: Until when?

Mr. Shutan: Well, we will claim it to the present, and we will ask permission of the Court to continue interest until we get payment. We don't know when that will be.

Q. (By Mr. Shutan): The last item you claim is attorney's fees in enforcing your rights under this trust deed. You claim $2,500. You have engaged an attorney, have you not, since——

The Referee: That is where you come in.

Mr. Shutan: That is where I come in, your Honor.

Q. (By Mr. Shutan): You have engaged me as your counsel? [228] A. I have.

Q. To represent you in enforcing your rights under this deed of trust? A. Yes.

Mr. Blonder: I will stipulate to that, Mr. Shutan.

Q. (By Mr. Shutan): And you have instructed me to take all steps necessary and legal and proper

(Testimony of William S. Lepper.)

for the protection of Bill Lepper Motors, and to come into the court on such occasions as may be proper to protect your interest under this mortgage and deed of trust and make such appearances as may be necessary in that connection as your attorney? A. That is right.

Q. And it is true, is it not, that since approximately February, 1951, I have been so engaged as representing Bill Lepper Motors, the corporation, in pursuing the rights of this corporation in this court under that deed of trust?

A. That is right.

Q. And do you feel that $2,500 is fair compensation to your counsel for the time, effort and representation which has been rendered to you to date in that representation? A. I do.

The Referee: Anything further?

Mr. Shutan: Just one second, your Honor.

I may point out to the Court, I doubt that—this may well be stipulated to by the Trustee, that we have [229] indicated credits reducing our claim as follows: That Bill Lepper Motors has received as rent from Consolidated Casting Company the sum of $2,960.

Mr. Seymour: What period is that for?

Mr. Shutan: I can't state that now, but the Trustee and I did have those figures.

Mr. Blonder: Those figures were brought out at the hearing on the rental situation.

Mr. Shutan: Yes. I believe there is an order on

(Testimony of William S. Lepper.)

that, as a matter of fact, at the hearing on the rental order to show cause.

There was received from the sale of a 1946 Oldsmobile pursuant to the security rights under the chattel mortgage the sum of $650, for which credit is given; and at the foreclosure sale on the chattel mortgage, from that sale there were turned over to the mortgagee, Bill Lepper Motors, the sum of $1,500; making a total credit of $5,110. This $5,110 deducted from the total charges which we have claimed makes a total of $64,944.07.

Now, your Honor, I believe it may not be improper for me to be heard for a moment at this time——

Mr. Blonder: Are you offering this as a stipulation, Mr. Shutan, this last concerning the credits?

Mr. Shutan: Yes.

Mr. Blonder: I will so stipulate if you will stipulate that Mr. Lepper would so testify, that he would testify [230] that Bill Lepper Motors, Inc., got this rent and the money from the sale of the Oldsmobile and the money from the sale of the personal property.

Mr. Shutan: Mr. Lepper, would you——

Mr. Blonder: Now, that is the stipulation that I will agree to, that if Mr. Lepper were asked these questions he would testify to these facts. I don't want to stipulate to the facts themselves.

Mr. Shutan: We will stipulate Mr. Lepper would so testify.

(Testimony of William S. Lepper.)

Mr. Blonder: Your Honor, several of the witnesses have asked, since it does appear we will not get to them——

The Referee: I was going to ask you, how much longer do you think this will take?

Mr. Blonder: I don't know how much longer Mr. Shutan will take, but Mr. Lepper's cross-examination will be quite lengthy.

The Referee: Well, we can go on Thursday all afternoon, and from 11 o'clock in the morning if you want. Supposing we do that. Is that an agreeable date?

Mr. Blonder: It is agreeable to me.

The Referee: How about you, Mr. Shutan?

Mr. Shutan: Fine. We are anxious to——

The Referee: All right, then I will continue this until next Thursday at 11 o'clock, and the witnesses and everybody can go. [231]

Mr. Shutan: I can finish my direct examination in about four more minutes.

The Referee: All right, go ahead, if it is just four more minutes.

Mr. Shutan: Will it be possible that the Court's calendar will be limited to this matter so we can really push it through?

The Referee: Well, it will be after 11 o'clock, and in the afternoon. I think it will be. I am not positive.

Mr. Blonder: I just recollect I have a creditors' meeting in the afternoon on Thursday. Could we start at 2 instead of 11?

(Testimony of William S. Lepper.)

The Referee: You have one in the morning?

Mr. Blonder: Well, let's make it at 11. I will cancel that.

The Referee: All right, go ahead.

Q. (By Mr. Shutan): Mr. Lepper, I show you a document entitled "Mortgage of Chattels," dated the 14th day of April, 1947, by Superior Casting Company as mortgagor to Reconstruction Finance Corporation, a corporation, as mortgagee, and apparently executed by those parties. Was that document part of the transaction to which we referred before whereby you purchased certain promissory notes and security papers from the Reconstruction Finance Corporation? A. That is right.

Q. In other words, this mortgage was, together with [232] the deed of trust, security for the note which we have heretofore discussed?

A. That is right.

Q. I show you a document entitled "Assignment of Mortgage of Chattels," dated the 13th day of October, 1950, signed by Reconstruction Finance Corporation by Ray C. Pavey, to Bill Lepper Motors, a California corporation. Was that document executed by Reconstruction Finance Corporation at the time of the assignment of their interest in these security papers and your purchase of the promissory note? A. Yes.

Q. By "your," I mean the Bill Lepper Motors Corporation. A. Yes.

The Referee: Where is Exhibit 3? Have you got it?

(Testimony of William S. Lepper.)

Mr. Shutan: This could well be it, your Honor. I would like to have these marked for identification.

The Referee: Which ones?

Mr. Shutan: The mortgage and the assignment of mortgage.

The Referee: Well, why is that necessary? We have to print that, too. I don't see any necessity for it.

Mr. Shutan: All right, your Honor, I will hold them.

The Referee: All right. Have you shown them to everybody?

Mr. Blonder: We have seen these before. [233]

The Referee: Anything further today?

Mr. Shutan: I have nothing. I think this would be a good time for the adjournment.

The Referee: All right, the court is adjourned.

(Whereupon an adjournment was taken until 11 o'clock a.m., Thursday, October 4, [234] 1951.)

Thursday, October 4, 1951—11 A.M.

The Referee: All right, let's go ahead in the Superior Casting Company matter.

Mr. Shutan: Your Honor, as indicated at the conclusion of the Tuesday afternoon session, I had completed the presentation of the Petitioner's case for the payment by the Trustee of the amount we claim under the deed of trust, and I rest on behalf of the Petitioner.

(Testimony of William S. Lepper.)

The Referee: All right, go ahead.

Mr. Blonder: Well, we have not completed the cross-examination of Mr. Bill Lepper.

Mr. Shutan: That is correct. I have concluded my direct examination of Mr. Lepper, let's put it that way.

The Referee: Well, you would have a right to redirect if you want to when he gets through.

Mr. Shutan: Yes.

The Referee: Go ahead, Mr. Blonder.

Mr. Blonder: Mr. Lepper, please.

WILLIAM S. LEPPER

recalled, testified further as follows:

Cross-Examination

By Mr. Blonder:

Q. Mr. Lepper, I beleive you testified that you are president of Bill Lepper Motors, a corporation; is that [235] right? A. Yes.

Q. Are you the sole stockholder of that corporation? A. No, sir.

Q. What percentage of the stock do you own?

A. Fifty per cent.

Q. Can you state generally now, Mr. Lepper, that in all of these transactions involving this trust deed and this chattel mortgage, that any of your acts were on behalf of Bill Lepper Motors, Inc., the corporation?

A. How do you mean, sir? I don't quite understand you.

(Testimony of William S. Lepper.)

Mr. Blonder: Let me ask your counsel this: Will you stipulate, Mr. Shutan, that whatever Bill Lepper did insofar as negotiating with the RFC or Superior Casting Company or in foreclosing the chattel mortgage, that he was acting on behalf of Bill Lepper Motors, Inc.?

Mr. Shutan: Why don't you put that question to the witness?

Q. (By Mr. Blonder): Can you answer that question, that you were acting on behalf of Bill Lepper Motors?

A. It would be hard to say that I was, because originally when I first went into this thing and got to talking about it, and so forth, a certain amount of talking conversation and thinking was done before the Board of [236] Directors meeting authorized me to go ahead.

Q. When was the Bill Lepper Motors formed, the corporation, do you know?

A. April 1, 1947.

Q. Therefore, it was in existence at the time you bought the trust deed and chattel mortgage?

A. Yes.

Q. And you were president of the corporation at that time? A. That is right.

Q. Mr. Lepper, I have seen the Exhibit A in the petition which you have filed, and I would like to have you tell me about the $650 credit which you indicate you received from the sale of a 1946 Oldsmobile. Will you tell me how you received that money?

(Testimony of William S. Lepper.)

A. Through the sale of the automobile.

Mr. Shutan: Just a minute. I object to that question unless counsel is going to attack that amount or show that——

The Referee: Your objection is overruled. Let's find out the facts. He knows.

Q. (By Mr. Blonder): Will you answer the question?

The Referee: Or he doesn't know.

The Witness: Well now, I don't know whether I am telling you what you want to——

Q. (By Mr. Blonder): You go ahead and tell me what you think you know. [237]

A. Yes. The car was sold at auction by Mr. Ackerman, my attorney, on the property in El Segundo, and bid, and that was the bid.

Q. Was the car sold at the same time the other equipment was sold out there? A. No, sir.

Q. When was the automobile sold?

A. I really don't know. I can't recall the date of it. I couldn't tell you.

Q. Do you know the date when the remaining equipment was sold out at El Eegundo?

A. I can't recall the date, no.

Q. Does the date December 7, 1950, sound familiar?

A. Yes, I think that would probably be the date, or very close to it, that the equipment was sold.

Q. Was the automobile sold before that time?

A. No, the automobile was sold at a later date.

Q. About how much longer afterwards?

(Testimony of William S. Lepper.)

A. That I really don't know.

Q. Well, was it the next day or a week later or a month later?

A. Oh, no, it was probably a month or so later.

Q. Did Mr. Ackerman handle the transaction?

A. Yes.

Q. Were you present at the time of the sale of the automobile? [238]

A. No. I wasn't in the country, in fact, at that time.

Q. Do you know who purchased the automobile.

A. Yes, I have a record of it.

Q. Well, can you tell me who purchased it? Was it purchased by Consolidated Casting Company?

A. No.

Q. Well, do you know who purchased the automobile?

A. It was purchased by a used car dealer.

Q. And how much did he pay for it, do you know?

A. $650, if I remember correctly, was the amount.

Q. Did Mr. Ackerman tell you what he did prior to the sale, that auction sale, insofar as advertising or publishing that sale?

A. Well, he told me prior to selling it what he would have to do. I don't remember exactly what he said. There was a certain legal procedure.

Q. Mr. Ackerman was your attorney at that time; is that correct?

A. That is correct, sir.

(Testimony of William S. Lepper.)

Q. Now, Mr. Lepper, turning now to this other item which you have set forth in your petition showing a receipt from the sale of personal property of $1,500. A. Yes.

Q. What personal property are you referring to when you mention that in your petition? [239]

A. Well, there was certain equipment that was on the property.

Q. Are you referring there to the personal property that was covered by the chattel mortgage that we have been talking about here before?

A. Yes, part of the equipment that was listed in the chattel mortgage. As was brought out in prior testimony, it was not all there, but what was there was sold.

Q. I show you here, Mr. Lepper, a document which has been handed to me by your counsel entitled "Mortgage of Chattels," dated April 14, 1947, showing Superior Casting Company as mortgagor and Reconstruction Finance Corporation as mortgagee. Attached to that document is an itemized inventory of machinery, equipment, furniture and fixtures and appliances belonging to Superior Casting Company, situated on the premises known as 1601 El Segundo Boulevard, El Segundo, California; and I will ask you to take a look particularly at that inventory which is designated Exhibit A. Have you seen that Exhibit A before, Mr. Lepper.

A. I have.

Q. And would you say, Mr. Lepper, that that is the equipment which was sold and for which you

(Testimony of William S. Lepper.)

received $1,500 which you have indicated as a credit on our petition? A. No, not in its entirety.

Q. Well, can you go down that list of equipment and tell me what portion of that was not sold? [240]

A. No, sir, I cannot tell you what was or what was not sold. If I may, can I explain this to you a little?

Q. If you will wait just a minute I will give you the opportunity to explain it. That is the chattel mortgage which you received by way of assignment from Reconstruction Finance Corporation, is it not, Mr. Lepper? A. Yes.

Mr. Blonder: May we introduce this document in evidence, your Honor, as the Trustee's Exhibit No. 1?

The Referee: All right.

TRUSTEE'S EXHIBIT No. 1

Mortgage of Chattels

This Mortgage made and entered into this 14th day of April, 1947, by Superior Casting Company, Inc., a California corporation, of the City of El Segundo, State of California, by occupation manufacturer of aluminum casting, Mortgagor to Reconstruction Finance Corporation, a corporation created and existing under the laws of the Congress of the United States, by occupation a lending Agency of the United States Government, Mortgagee,

(Testimony of William S. Lepper.)

Witnesseth: The said Mortgagor does hereby mortgage to the said Mortgagee all of Mortgagor's personal property now or hereafter used in connection with the operation of the manufacturing business belonging to the Mortgagor and situated in and upon the premises known and described as 1601 El Segundo Boulevard, El Segundo, California, located in the City of El Segundo, County of Los Angeles, State of California, * * *

All As Security for the payment to and full compliance with the terms and provisions of that certain Promissory Note dated April 14, 1947, executed by the undersigned Mortgagor, payable to the order of Mortgagee, at the office of Federal Reserve Bank of San Francisco, in the City of Los Angeles, State of California, in lawful money of the United States in the principal sum of One Hundred Thousand and No/100 Dollars ($100,000.00), with interest on the unpaid balance thereof, at the rate of four (4%) per cent per annum, from date, payable as to principal and interest as follows: * * *

It is also further agreed that said promissory note is also secured by a certain deed of trust to Mortgagor of even date herewith and it is hereby agreed that in case of default under said note the holder thereof may, at its sole option, and without limiting affecting any rights or remedies conferred upon it by this mortgage or said deed of trust foreclose this mortgage and/or exercise any rights and remedies conferred upon it under said deed of trust, either concurrently or in such order as it may allow and may sell or cause to be sold in such order as it

(Testimony of William S. Lepper.)

may determine as a whole or in such parcels as it may determine the property described in this mortgage and/or in said deed of trust.

In Witness Whereof, the said Mortgagor has duly executed these presents the day and year first above written.

[Seal] SUPERIOR CASTING COMPANY, INC.,

By FRANK D. ANDERSON,
President.

By BEN E. EASTMAN,
Secretary-Treasurer.

State of California,
County of Los Angeles—ss.

On this 14th day of April, 1947, before me, Melba W. Harrington, a Notary Public in and for said County, personally appeared Frank D. Anderson, known to me to be the President, and Ben E. Eastman, known to me to be the Secretary of Superior Casting Company, Inc., the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

Witness my hand and official seal.

[Seal] MELBA W. HARRINGTON,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires December 28, 1948.

(Testimony of William S. Lepper.)

Recorded at request of Title Insurance & Trust Co., May 2, 1947, 8 a.m. Compared, Mame B. Beatty, County Recorder. Copyist No. 98.

By G. MAAG,
Deputy.

[Endorsed]: Filed October 4, 1951.

Q. (By Mr. Blonder): Did you, Mr. Lepper, ever see any list of the equipment that was sold in El Segundo for $1,500?

A. I saw no other list than this.

Q. I show you, Mr. Lepper, a two-page document handed me by your counsel entitled "Amended Notice of Sale of Personal Property," and ask you whether you have ever seen that before, either that copy or the original of it?

A. I think I have.

Q. That Amended Notice of Sale of Personal Property which I have just shown you lists a certain group of equipment. Would you say, Mr. Lepper, that the equipment set forth in that Amended Notice is the equipment that was sold for which you obtained $1,500?

A. No, I wouldn't say that it is. I wouldn't say that it isn't. I really don't know.

Q. Mr. Lepper, did you attend a sale on the premises [241] of Superior Casting Company in El Segundo wherein certain machinery, equipment, supplies and so on were sold at public sale?

(Testimony of William S. Lepper.)

A. I was there. I wasn't in attendance at all times, but I was there on the property at the time.

Q. That was a sale which was conducted by Mr. Ackerman, your attorney at that time; is that right?

A. That is right, sir.

Q. And that was a sale which Mr. Ackerman conducted pursuant to instructions from you to foreclose upon the chattel mortgage which is Trustee's Exhibit No. 1; is that right?

A. That is right.

Q. When did that transaction take place? I won't call it a sale. I will refer to it as a transaction, if you don't mind. When did that transaction take place? Do you recall?

A. I am not positive, but I believe the date you mentioned a while ago, December 7th, is correct.

Q. 1950? A. Yes.

Q. And what time of the day, do you recall?

A. I believe it was in the morning. I am not sure, but it seems to me it was prior to noon.

Q. And at that time you were out there with Superior Casting operating their business? [242]

A. No, Superior Casting was not operating at that time.

Q. They were shut down at that time?

A. Superior Casting was no longer there or represented there at that time.

Q. And when you went out there that day Mr. Ackerman was there, I presume? A. Yes.

Q. And Mr. Falkenberg from Consolidated was there? A. That is right.

(Testimony of William S. Lepper.)

Q. And Mr. Smith from Pioneer Tool was there; is that right??

A. I understand that is correct.

Q. And Mr. Scherer was there that day also from Pioneer Tool? Do you know him?

A. No, I don't know him.

Q. Do you know Mr. Vern Laughlin?

A. No, I never saw him before until someone pointed him out here in court the other day.

Q. Who else was present at that time?

A. There was a Mr. Saither, who was on the property. I don't think he was actually present at the sale. There was a group in the office, but it wasn't at the sale.

Q. How many other people were there around there that you didn't know personally?

A. Well, I don't know. There was a man there that [243] had something to do with conducting the thing, I think by the name of Lorenzo.

Q. Frank Lorenzi? A. I think so.

Q. Was he actually present during this transaction when the property was sold? A. Yes.

Mr. Shutan: Your Honor, I have just discussed with counsel whether this was really proper cross-examination or more properly an affirmative defense to be put on by the Trustee. As a practical matter, it won't make too much difference, but I think that properly this is not cross-examination.

The Referee: I know, but as long as he can put it on some other way, let him go ahead.

Mr. Shutan: All right, sir.

(Testimony of William S. Lepper.)

Q. (By Mr. Blonder): Do you know Mr. Emmett Falkenberg? A. I do.

Q. He is the president of Consolidated Casting, is he not? A. I am not sure.

Q. Is he an officer of Consolidated Casting?

A. Yes.

Q. And Consolidated Casting is a corporation; is that right? A. Yes, as I understand. [244]

Q. Do you own any stock in Consolidated Casting Company? A. I do not.

Q. Did you ever? A. No.

Q. Were you ever an officer or director or stockholder in Consolidated Casting Company?

A. I have never been a stockholder.

Q. Have you ever loaned Consolidated Casting Company any money? A. I have.

Q. Did you say that you were never an officer, director or stockholder of Consolidated Casting?

A. Phrase that again, please.

Q. Were you ever an officer of Consolidated Casting Company? A. No.

Q. Were you ever a director of Consolidated Casting Company?

A. I really don't know, to tell you the truth, whether I have been or not.

Q. Well, do you know what a director of a corporation is, Mr. Lepper? A. Yes.

Q. I will ask you one more question. Did you ever own any stock in Consolidated Casting Company? [245] A. No.

Q. And are you telling me now that you don't

(Testimony of William S. Lepper.)

know whether you ever were or were not a director of Consolidated Casting Company?

A. That is right. Would you like me to explain that to you? A. Yes.

A. Well, I have loaned Consolidated Casting Company some money, and it was the understanding at the time I loaned them some money that I was to be able to have some representation on the thing as to what disposition was to be made of this money, I mean as far as how it was to be used; and there was—at that particular time there was a statement made by Mr. Falkenberg, I believe, that possibly I would like to be a director on there. If I wished to, it would be all right with him. What actually has transpired I have never inquired or never bothered about, and I really don't know. I am just trying to be truthful. I don't want to say I am or I am not because I really don't know. It may sound like a rather funny thing, but it really didn't mean enough one way or another, and I don't know.

Q. When you conducted certain transactions with Consolidated Casting Company, what individual in that company did you deal with, Mr. Falkenberg? A. Mr. Falkenberg.

Q. Did you deal with anyone else in the company? [246] A. No.

Q. So your dealings or transactions or whatever they were with Consolidated Casting Company were always through Mr. Falkenberg?

A. That is right.

(Testimony of William S. Lepper.)

Q. Did you ever have any negotiations or transactions with Mr. Saither?

A. Well, at the time that Consolidated Casting Casting Company was formed—you asked me a while ago if Mr. Falkenberg was president, and I told you I didn't know.

Q. Yes.

A. Because when it was originally formed, I believe,—I don't know this, but I believe Mr. Saither was president and as president I am pretty sure that he signed a note on the money I loaned. I mean, if you call that a transaction.

Q. Yes.

A. I mean, I just bring that up.

Mr. Shutan: If the Court please, I don't want in any way to obstruct the full information reaching the Court in this thing, and I don't want anything I say to be interpreted that way; but this is an action for money owing on a deed of trust, and unless counsel can tie in his questioning to the case put on by the petitioner, I hereby object to this line of questions.

The Referee: All right, your objection is overruled and you may make a motion to strike it later if you don't [247] tie it in.

Mr. Shutan: Thank you, sir.

Mr. Blonder: Would the Court be interested in hearing my position as to what I am attempting to prove?

The Referee: Oh, no, go ahead. You can explain it to Mr. Shutan if you want to.

(Testimony of William S. Lepper.)

Mr. Blonder: O.K., during the noon recess I will do that.

Q. (By Mr. Blonder): Do you know when Consolidated Casting Corporation was formed as a corporation, approximately? If you don't know, you, of course, can say so.

A. I don't know the exact date. It is hard for me to remember dates.

Q. Well, do you remember that it was formed on or about December 7, 1950?

A. No, it was formed prior to that time.

Q. Was it shortly prior to the time that you held this sale in El Segundo, would you say?

A. Well, that is a difficult question. What do you mean by "shortly"? I know it was formed——

Q. Within a month or two before that?

A. Somethink like that, I would say.

Q. Would you say it was formed about the time you acquired the trust deed and mortgage from the RFC? A. No.

Q. In other words, Consolidated Casting Company was [248] formed before they purchased the equipment in El Segundo; is that right?

A. Yes.

Q. Was Consolidated Casting Company in business at any other place before they opened a place of business in El Segundo?

A. Not to my knowledge. I don't think so.

Q. Would you say, Mr. Lepper, that Consolidated Casting Company was formed for the specific purpose of purchasing the equipment and other

(Testimony of William S. Lepper.)

assets out in El Segundo that formerly belonged to Superior Casting? A. No.

Q. Did you ever have any discussions with Mr. Falkenberg——

Mr. Shutan: I object to that and move to strike the answer on the ground that the question assumes that this witness knows.

The Referee: No, if he doesn't know let him say so.

Q. (By Mr. Blonder): Did you ever have any discussions with Mr. Emmett Falkenberg relative to forming a corporation for the purpose of taking over any of the equipment or other assets of Superior Casting Company?

The Referee: That only calls for a yes or no answer.

The Witness: Will you ask that again, please?

(Record read as follows:

"Q. Did you ever have any discussions with Mr. Emmett [249] Falkenberg relative to forming a corporation for the purpose of taking over any of the equipment or other assets of Superior Casting Company?")

The Witness: Well, no, not in that respect.

Q. (By Mr. Blonder): When was the first time that you loaned any money to Consolidated Casting Company?

A. I really don't know the exact date.

Q. Was it before December 7, 1950?

A. I really can't recall.

(Testimony of William S. Lepper.)

Q. Well, to the best of your knowledge—let me withdraw that. How much money did you loan to Consolidated Casting Company?

A. You mean in December of——

Q. No, I mean at all times, from the time you first knew Consolidated Casting Company existed to the present time, how much money have you loaned them? A. $50,000.

Q. That $50,000 that you say you have loaned to Consolidated Casting Company, did you give it to them in a lump sum? A. No.

Q. Did you give it to them in a series of payments?

A. Well, I gave them a couple of checks, if that is what you mean.

Q. Did you give that $50,000 to Consolidated Casting Company in the form of several [250] checks? A. Yes.

Q. And what was it, two checks that you gave them? A. Three I think in all.

Q. The total of those three checks amounted to $50,000? A. That is right.

Q. When was the first check that you gave them? A. I can't recall.

Q. How much was the first check for?

A. $20,000, if I am not mistaken.

Q. How much was the second check for?

A. The second check was for $20,000, and the third one was for ten.

Q. Do you have those cancelled checks?

A. I have.

(Testimony of William S. Lepper.)

Q. In your possession?

A. Well, I don't have them here. Actually, they are in storage along with a lot of other papers. You see, I went away in December and put all my household furniture and business records and everything in storage.

Q. Mr. Lepper, will you bring those checks into court as this proceeding continues? We will probably be here this afternoon and so on.

A. It would not be possible to do it today.

Mr. Shutan: I object to that. We have had no notice to produce anything. [251]

The Referee: What is the objection?

Mr. Shutan: Counsel has made a demand on this witness to bring in certain records. He says during the course of this proceeding. This is the first information we have had they desired them.

The Referee: What is wrong with bringing them in if you have got them?

Mr. Shutan: Mr. Lepper was trying to explain these things were put in storage in December before he went to Europe, and he asked for them this afternoon.

The Witness: I don't even know where they are.

The Referee: Then get them in the next hearing.

Q. (By Mr. Blonder): You will get them in the next hearing?

A. If I can find them I will be very happy to.

Q. What I am trying to get at is the time element, and if you will think a few moments I think you can probably help me out.

(Testimony of William S. Lepper.)

A. I can help you out from the stubs. I have my check book out here.

Q. It doesn't have to be the exact date.

A. May I bring my check book instead of the checks, because I have that?

The Referee: Yes, certainly, you bring whatever you have.

Q. (By Mr. Blonder): Bring the stubs and then bring the [252] checks later.

A. There is no point in bringing the stubs and then bringing the checks later. I will wait and bring the checks.

Q. Did Consolidated give you any security for that loan? A. They gave me a note.

Q. Did you get a chattel mortgage on any equipment or other property? A. No.

Q. Did you get a trust deed or mortgage on any real property? A. No.

Q. Did you get an assignment of any accounts receivable or any other tangible assets?

A. No.

Q. In other words, your testimony now is that all you got is a promissory note for the $50,000, without any security; is that right?

A. That is right.

Q. When is that note payable?

A. On demand.

Q. Do you have that $50,000 note with you at the present time? A. I do not.

Q. Will you bring that note also with you at the next hearing, Mr. Lepper? [253]

(Testimony of William S. Lepper.)

A. If I can find it I will be very happy to.

Q. Well, are you telling us now that probably you cannot find that note?

A. It is very possible.

Q. What do you think has happened to it?

A. It is not lost, I can assure you, but have you ever moved and put things in storage?

Q. Yes, I have, but if somebody owed me a $50,000 note I could certainly find it, I would know where it was.

A. I can find it. It is just a matter of time.

Q. Now, getting back to this particular transaction which took place in El Segundo wherein certain property was sold, as I understand it, there were several bidders out there bidding on this equipment, machinery and personal property; is that correct? A. I am not sure, sir.

Q. Were you there when the sale was conducted?

A. Not during the time the actual sale—part of it, but not all of it. I was on the property, but not at the actual spot.

Q. Now, at the time that sale took place did you on behalf of Bill Lepper Motors, Inc., have possession of that property? A. Yes.

Q. Mr. Ackerman conducted the sale; is that correct? A. That is correct. [254]

Q. What did Mr. Ackerman say? Tell me what happened?

A. Frankly, I don't know. I wasn't right at the point of the sale during the exact time the sale took place.

(Testimony of William S. Lepper.)

Q. Where were you?

A. I was in the front office of the building.

Q. Well, on that particular day when that sale was scheduled you went out to El Segundo, the premises of Superior Casting Company?

A. I went out there.

Q. Is that right? A. That is right.

Q. Suppose you tell me everything that happened, insofar as you know, and everything that happened, insofar as you are concerned, from the moment you walked into the premises.

A. All right. Well, this Mr. Ackerman and this fellow Lorenzi, or whatever his name is, were both there, and I don't know, there was a conversation. There were a couple or three people milling around, and——

Mr. Shutan: I am going to ask counsel to reframe the question to be more specific instead of a shotgun question like that. This is cross-examination.

Mr. Blonder: That is why I think that my line of questioning can be quite broad. I am trying to find out what Mr. Lepper knows about what occurred that day. So far he [255] tells me he knows nothing. Let him start from the beginning and tell me what happened.

The Referee: You can test his memory. Objection overruled.

Mr. Blonder: Go ahead, Mr. Lepper.

The Referee: Tell us what you remember about it.

The Witness: Well, the only thing I can tell you

(Testimony of William S. Lepper.)

is what I remember; and to the best of my knowledge, I remember that Mr. Ackerman read from this paper. I was there at that time, but I didn't pay too terrible much attention to it. There was a certain amount of legal formality which I don't understand; and he also made the statement, I do remember that because I was anxious to see that the thing was properly handled from that point of view, that all of the equipment that was on this list was not all being sold because it wasn't all there, and the only thing being sold in the way of equipment was what could be seen physically on the property. About that time I was called to the front office on a phone call. I went in there and was in there I don't know how long, and when I came back out the sale of this thing was still going on and—or as I remember the picture later, frankly,——

Q. (By Mr. Blonder): Well, let me interrupt you. Tell me actually what was happening rather than saying the sale was going on.

Mr. Shutan: Confine your remarks to what you observed, [256] and not what came to you later.

The Witness: Well, when I came back outside Mr. Ackerman was asking for a bid. Mr. Falkenberg said $1,500. Mr. Ackerman asked for other bids, and he finally said, "Sold to Mr. Falkenberg."

Q. (By Mr. Blonder): Did he say, "Sold to Mr. Falkenberg," or "Sold to Consolidated Casting"?

A. I don't remember, to tell you the truth,

(Testimony of William S. Lepper.)

whether he said Falkenberg or Consolidated or just what.

Q. Now, you saw this Mr. Smith and Mr. Scherer there that day; is that right?

A. There were other people there. I don't remember them. They have been pointed out to me in court, but I don't remember them, frankly.

Q. You know Mr. Smith, don't you?

A. He has been pointed out to me in court.

Q. Did you see him there that day?

A. I don't recall.

Q. What about Mr. Scherer, do you recall him?

A. Him I don't know.

Q. After Mr. Ackerman said, "Sold to Mr. Falkenberg," what happened after that?

A. There wasn't anything happened.

Q. Did Mr. Ackerman get any money from Consolidated Casting or Mr. Falkenberg?

A. I don't really remember what happened because I went back in the office then.

Q. Well, you show on your petition that you received $1,500. A. Yes.

Q. How did you get that, in cash or check?

A. If I recall it was a check.

Q. And from whom did you receive the check?

A. Consolidated Casting.

Q. Did you receive it right that day?

A. I don't remember.

Q. You don't remember when you got the check; is that right?

A. No. May I explain this was about the 7th of

(Testimony of William S. Lepper.)

the month. I had just negotiated a sale of my house, putting everything into storage, and I left on the 12th of the month for Europe. I had a lot of things on my mind and I left some things for Mr. Ackerman to take care of, and I didn't pay too much attention to all the little details. I mean, I had a lot of things on my mind and I don't remember all the details.

Q. Mr. Lepper, if there is anything you don't understand or you don't remember, just say so. We all know those things can happen. Now, do you know what happened to the $1,500 after you got it, the $1,500 check?

A. I know it was deposited in my account.

Q. When you say it was deposited in your [258] account, you mean the Bill Lepper Motors, Inc., account?

A. Bill Lepper Motors, Inc., that is right. I don't remember the exact depositing of it. I made a lot of deposits in the last few years.

Q. Now, when was the last time you were on the premises on El Segundo Boulevard previously occupied by Superior Casting Company?

Mr. Shutan: I object to that as completely irrelevant to anything before the Court.

Mr. Blonder: I will tell you what I am attempting to prove, Mr. Shutan. I want to prove that the particular equipment which was sold on this particular day is still in the possession of Consolidated Casting Company.

The Referee: Well, why not find out?

(Testimony of William S. Lepper.)

Mr. Shutan: How is that relevant?

Mr. Blonder: It is relevant to prove the value of the property. It may be necessary to actually go out——

The Referee: Then ask the witness where it is if he knows.

Mr. Blonder: All right, let me withdraw that question and I will reframe it.

Q. (By Mr. Blonder): You say the equipment that was sold that particular day to Consolidated Casting Company, you saw it, is that right?

A. Yes.

Q. Is that equipment still in the possession [259] of Consolidated Casting Company?

A. As far as I know. I would have no reason to know whether it was or wasn't.

Q. But as far as you know it has not been moved out of the premises; is that right?

A. That is right. I haven't heard that it has been.

Q. Prior to the time of this sale, did you have any discussions with Mr. Falkenberg about Consolidated Casting purchasing this equipment?

A. Well, yes, he said he was going to bid on it.

Q. Where did you have that discussion with Mr. Falkenberg?

A. Oh, I don't remember. I mean when I say that I presume that I must have. There was sure something mentioned about it, it was only natural, but I don't remember any conversation exactly, but I am——

(Testimony of William S. Lepper.)

Mr. Shutan: Mr. Lepper, if you don't recall you are entitled to say you don't recall.

The Witness: I don't recall.

Mr. Shutan: Your only obligation is to answer these questions to the best of your ability.

Mr. Blonder: If the Court please, it is 10 minutes after 12. Does the Court desire to continue?

The Referee: Whatever you want to do is all right with me.

Mr. Blonder: This will be rather lengthy. [260] I can continue on as long as your Honor desires.

The Referee: All right, then let's go on until 12:30 then.

Mr. Blonder: All right, your Honor.

Q. (By Mr. Blonder): Did you have more than one discussion with Mr. Falkenberg about Consolidated Casting purchasing this equipment?

A. I don't recall.

Q. At the time that you had your discussions with Mr. Falkenberg, did you indicate to him that you would do everything that you could to see to it that he could purchase this equipment as cheaply as possible?

Mr. Shutan: I object to that question. There is no foundation for that at all.

The Referee: Objection overruled. He can answer the question yes or no.

Q. (By Mr. Blonder): Answer the question, Mr. Lepper. A. No.

Q. Mr. Lepper, you have testified that you

(Testimony of William S. Lepper.)

loaned this $50,000 to Consolidated prior to the sale, I believe; is that correct?

A. No, I didn't testify to that. I testified that I don't remember just when it was.

Q. Did you loan them any portion of the $50,000 before this sale, can you recall?

A. I can't remember. [261]

Q. Is it possible that you may have?

A. It is possible, yes.

Q. At that time Consolidated Casting Company was not in business, is that right, prior to the sale of this equipment?

A. They were in business.

Mr. Shutan: These questions have all been asked and answered to the best of the witness' ability here.

Mr. Blonder: Let him testify.

The Witness: They were in business.

Q. (By Mr. Blonder): Where were they operating?

A. 1601 El Segundo Boulevard, El Segungo, California.

Q. Consolidated was there prior to the time of the sale of this equipment; is that right?

A. That is right.

Q. Did they have any physical assets there?

A. I assume that they did.

Q. What was the business of Consolidated Casting Company out on El Segundo Boulevard?

A. Aluminum castings.

(Testimony of William S. Lepper.)

Q. Were they using the equipment which was sold at this sale that you told us about?

A. Yes.

Q. Did they have any other equipment that they had brought in themselves in their operations on El Segundo Boulevard? [262]

A. I don't know.

Q. Mr. Lepper, it has been brought out in hearings here in this court that there were other bidders on this property other than Consolidated Casting Company. Did you see any other people bidding at that sale? A. I didn't see anyone bidding, no.

Q. Did Mr. Falkenberg tell you that there were other bidders prepared to bid on the property?

Mr. Shutan: I object to that.

Mr. Blonder: This is cross-examination.

The Referee: Just ask him what Mr. Falkenberg told him on that subject. You can answer that.

The Witness: I don't recall any conversation about it.

The Referee: You can answer that just yes or no, if you remember it.

Q. (By Mr. Blonder): Now, isn't it true—he said he didn't remember, your Honor.

Isn't it true, Mr. Lepper, that there were other people bidding on that property, that they did bid higher than $1,500, and that they were approached either by yourself or Mr. Falkenberg and requested not to bid? A. No, not by me.

Q. Isn't it true, Mr. Lepper, that other bidders on the property were actually paid a certain amount

(Testimony of William S. Lepper.)

of money for the purpose of not bidding on this property?

Mr. Shutan: Well, I object to that question, although [263] I think we all should know if such a thing happened.

The Referee: Mr. Shutan, wait a minute. This is cross-examination. We are entitled to a broad field of examination. If he doesn't know about it he can say so. If he does know something about it we are entitled to know what he does know.

Mr. Blonder: Mr. Reporter, will you read the question?

(Record read as follows:

"Q. Isn't it true, Mr. Lepper, that other bidders on the property were actually paid a certain amount of money for the purpose of not bidding on this property?")

The Witness: I have heard that, since this thing here, but——

Mr. Shutan: Mr. Lepper, you may confine your answer to what you know of your own knowledge.

The Witness: I didn't know about it, no.

The Referee: That would be hearsay, then.

Q. (By Mr. Blonder): From whom did you hear that such a transaction took place?

A. Well, I didn't hear that it took place, but I heard that there was testimony concerning it, from Mr. Shutan.

The Referee: That question is all right.

(Testimony of William S. Lepper.)

The Witness: My counsel told me that there was testimony about it here in this courtroom.

The Referee: What?

The Witness: My counsel told me that there was testimony about it here in this courtroom. [264]

The Referee: Well, do you know who gave the testimony?

Mr. Blonder: Yes, we know, your Honor. It is in the record.

The Referee: Then don't badger him about it, if you know.

Q. (By Mr. Blonder): Was that the first time you ever heard about that transaction?

A. The first time I heard about this money that was supposed to be paid?

Q. That is right. A. No.

Q. You had heard about that before; is that right? A. That is right.

Q. And who told you about it before?

A. I don't recall exactly.

Q. Well, when did you hear about it before?

A. That I don't remember, either.

Q. Well, approximately? Last month, last year, six months ago. Give us some idea.

A. Well, I heard about it a few days ago.

Q. And from whom?

A. I don't remember. I have talked to several people, and I don't recall.

Q. Did you ever hear about that incident happening before it was brought out in court a week or two ago? [265]

(Testimony of William S. Lepper.)

A. I heard rumors to the effect, yes.

Q. Well, from whom did you hear the rumors?

A. I don't remember.

Q. Did Mr. Falkenberg ever tell you that?

A. No, he didn't.

Q. Did Mr. Scherer ever tell you that?

A. I have never met Mr. Scherer.

Q. Or Mr. Smith, did Mr. Smith ever tell you that? A. I don't know Mr. Smith.

Mr. Blonder: May I at this time ask Mr. Daniel Gage if—may I ask Mr. Gage for either one of the two affidavits which I am informed he has, being affidavits of a Mr. Scherer and a Mr. Smith concerning that particular transaction about which I am asking the witness questions now?

Mr. Gage: There has been no demand made upon me until now. I will produce the affidavits at 2 o'clock.

The Referee: What did you say?

Mr. Gage: I will produce the affidavits at 2 o'clock.

The Referee: Demand is made upon you now, sir. Have you got them?

Mr. Gage: I said I would bring them in at 2 o'clock. They are in my office.

The Referee: That is O.K.

Mr. Blonder: May we then have a recess until 2 o'clock, your Honor?

The Referee: That is all right. [266]

(Discussion off the record.)

The Referee: Then we will continue it until 2 o'clock p.m. [267]

Thursday, October 4, 1951—2 P.M.

The Referee: This case will be continued four weeks. Now, that will be—well, say Thursday, November 1st, at 10 a.m., for the hearing on the petition, and all witnesses will return on that date unless otherwise notified.

Mr. Blonder: Should I call off the names of the witnesses, your Honor?

The Referee: Yes, you might do that.

Mr. Blonder: Mr. Falkenberg, Mr. Laughlin, Mr. Keats, Mr. Smith, Mr. Scherer, Mr. Ackerman, Mr. John Gray.

The Referee: You may not have to come back, gentlemen, but come back unless they notify you in the meantime. Maybe all differences will be adjusted by that time and you won't have to come back. Don't misunderstand me about that. You are to come back unless you get notification from Mr. Blonder or Mr. Chichester that you don't need to come back. That is the petition to compromise.

Mr. Blonder: No, we will bring the petition on before.

The Referee: Make it 11 o'clock. That will be better.

Mr. Blonder: That 11 o'clock date on November 1st——

Mr. Chichester: Your Honor, is it the idea of the Court that the petition to compromise will be heard at 10 o'clock that day?

The Referee: No, it will be heard here in the meantime. We can start at 11 and go the rest of the day if you [268] have to go ahead.

Mr. Blonder: That will be November 1st at 11 o'clock, gentlemen, unless you are notified to the contrary. [269]

Certificate

I, H. A. Singeltary, hereby certify that on the 2nd and 4th days of October, 1951, I attended and reported, as official court reporter, the proceedings in the above-entitled and numbered matter before the Honorable Reuben G. Hunt, Referee in Bankruptcy, in said Matter, and that the foregoing is a true and correct transcript of the proceedings had therein on said dates, and that said transcript is a true and correct transcription of my stenographic notes thereof.

Dated at Los Angeles, California, this 28th day of December, 1951.

/s/ H. A. SINGELTARY,
Official Court Reporter.

[Endorsed]: Filed January 3, 1952, [270] Referee.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON HEARING ON PETITION TO COMPROMISE CONTROVERSY

Appearances:

For the Trustee:
DAVID BLONDER, ESQ.

For Bill Lepper Motors:
ROBERT H. SHUTAN, ESQ.

For Certain Creditors:
RUSSELL B. SEYMOUR, ESQ.

For Certain Creditors:
DANIEL W. GAGE, ESQ.

For Consolidated Casting Co.:
JAMES T. BYRNE, ESQ. [272]

Tuesday, October 30, 1951—10:30 A.M.

The Referee: We will now take up the Superior Casting Company case.

Mr. Blonder: Your Honor, this morning we have a hearing on the offer of compromise. Is there objection, Mr. Seymour and Mr. Gage?

Mr. Seymour: There is. We have filed objections to it, and have served a copy on Mr. Blonder.

Mr. Blonder: The copy was served on me in the courtroom this morning.

The Referee: I have gone over this. I am in favor of the compromise. But if this creditor wants to assume the burden of contesting the matter, it can, and can take its chances. I am going to rule in favor of the compromise.

Mr. Seymour: I appreciate your Honor's views. But it happens that we are all out of money and we have nothing left to put up a bond with.

Mr. Blonder: The same position was taken when these same gentlemen attempted to prevent the sale of the real estate for $75,000. At that time they said they didn't want it sold, because of certain things, and we told them that if they would come up with an offer of a certain amount in cash it might be different, and they came up with the same answer, "Fresh out of money." So we sold the property for $75,000, and now they are complaining about the offer to [273] compromise. I would like to see something to back up these continuous complaints.

The Referee: I am not stating what I will do. Mr. Shutan, are you in favor of or against the compromise?

Mr. Shutan: I am in favor of the compromise.

Mr. Blonder: I think there are some creditors in the courtroom also that the Court may be interested in hearing from.

Mr. George B. Kay: The American Smelting & Refining Company, approximately $25,000.

The Referee: You have the same privilege, if you want to guarantee that amount to the estate or to take over the burden of litigating this matter.

Mr. Kay: I would be in favor of it, but I don't want to take it over.

The Referee: I have seen too many offers of this kind that came to nothing, because of a situation

like this, unless some creditor wanted to take the burden over.

Mr. Blonder: Are there any other creditors in the courtroom? (Pause.) Evidently not.

Mr. Seymour: I want your Honor to understand everything that is going to take place. We are going to review this matter.

The Referee: You don't have much chance, because all the decisions are against you.

Mr. Seymour: May I make a short argument, then, that [274] may have some weight?

The Referee: No use making an argument. If you can take over the burden here, all right. Otherwise I am going to approve this compromise.

Mr. Seymour: Even though, your Honor, on the facts stated in the petition, I can demonstrate to your Honor that they are not entitled to do it? Will your Honor listen to me?

The Referee: I can't help it. We have got the offer.

Mr. Seymour: Even if I can show your Honor that we can get, under the law, under the facts admitted——

The Referee: I don't know what might come out of the litigation. Nobody knows. The outcome of a lawsuit can never be demonstrated in advance.

Mr. Seymour: Let me make about a two or three-minute speech here. I like to make speeches.

The Referee: All right.

Mr. Seymour: The evidence that has been partially adduced before this Court is to the effect that there was a fraud in connection with the sale of

this chattel mortgage. I don't know whether your Honor happened to be in the courtroom when that evidence was taken.

The Referee: There is no evidence of fraud yet.

Mr. Seymour: Your Honor hasn't been here and heard it all.

The Referee: Just answer my question.

Mr. Seymour: There has been evidence of substantial [275] fraud here.

The Referee: Before me?

Mr. Seymour: The Court started it, and then there was a 21-A examination, and whether or not Mr. Blonder pointed the situation out to you I don't know, but I would like to point it out to you.

Mr. Blonder: You said sometime previously that there were no 21-A examinations. Are you stating now that there were?

Mr. Seymour: I am stating they were partially conducted. The point is that there is evidence before this Court under that 21-A examination, and Mr. Blonder knows it.

The Referee: I know all that. But do we want to lose this offer?

Mr. Seymour: I am going on this assumption, that there is evidence——

The Referee: I don't care about that. Suppose we follow your course, and in the end we lose. Do you mean to say that we will then lose the benefit of this compromise offer? That is what I want to know. There is a prior case on this.

Mr. Seymour: I don't think so.

The Referee: Now, stick to that. You have an opportunity to guarantee this thing and take it over.

Mr. Seymour: May I ask your Honor if your Honor is familiar with the fact that there was a bid of $9,000 made [276] for this chattel mortgage property, and that the bidders, to wit, Consolidated Casting, and the agents in charge at that sale, paid one bidder $1,000 not to make a bid? Is your Honor familiar with that?

Mr. Blonder: I stated to your Honor in my opening statement that that would be the evidence we would adduce. All the facts upon which the Trustee based his objection to the claim of $64,000 were certainly adduced before your Honor on the trial. After the morning session they came through with this offer. The offer is $20,000 in cash, plus $1,500 to be deducted from the amount of the Bill Lepper claim, so, in effect, the estate is gaining $21,500. That is the net result of the offered compromise.

The Referee: You have your remedy here.

Mr. Seymour: I would like to have your Honor read the case of Metheney vs. Davis, 107 Cal. App., page 137, which holds that where there has been fraud in connection with a chattel mortgage, that the holder of that obligation is not entitled to recover.

The Referee: Well, then, you take it over.

Mr. Seymour: I don't have $21,000.

The Referee: Then the petition is granted. Objection overruled.

Mr. Blonder: May the record show that there

was a creditor in the court approving it, the creditor being American Smelting & Refining Company, Federated Metals [277] Division of American Smelting & Refining Company, whose claim is approximately $25,000? That is represented by Mr. Kay. This creditor is an unsecured creditor.

Mr. Seymour: May the record also show that demand was made upon the Trustee that objections be brought to that very same claim that counsel is talking about.

The Referee: All right.

Mr. Blonder: Your Honor, with reference to the demand this morning, would it be appropriate at this time for the Trustee to make a motion to strike that demand, for the reason that it does not state any facts sufficient to constitute the basis for the claim of Mr. Seymour is asserting?

The Referee: I would rather you would get a formal order.

Mr. Blonder: These documents were filed this morning, and this is the first time we have seen them.

Mr. Seymour: I would like to have findings.

Mr. Blonder: I will submit them for approval, and if they are not good enough, I am sure somebody can correct them. I am wondering if, in view of the fact that Mr. Seymour threatens review, if it might not be advisable to take testimony in the matter.

The Referee: You can do whatever you want to.

Mr. Seymour: May we offer testimony, too, your Honor?

The Referee: I am not deciding this now. I am giving the objecting creditor or creditors the right to take this [278] litigation over, provided they will guarantee this estate in the end that it will protect the estate, so that, in the end, the estate will get this much.

Mr. Blonder: I believe we should include that particular phase of it in the findings, then. I will make it part of the order, that if the petitioning creditors want to take over the litigation——

The Referee: The order can provide that they were given that privilege, but that they refused to take it over.

Mr. Blonder: May I ask at the present time if Mr. Gage, who represents certain other objecting creditors, whether or not he, on behalf of his clients, also refuses this offer which is being given to him by the Court?

Mr. Gage: That is correct.

Mr. Blonder: May the record show that Mr. Gage also refuses the offer suggested by the Court?

The Referee: Mr. Seymour and Mr. Gage object.

Mr. Seymour: I will take it over if we don't have to put up $21,000.

The Referee: Well, you don't want to put up anything. You want the other creditors to gamble with you, and they don't want to. Of course, you wouldn't have to put up cash. You could put up a bond.

Mr. Seymour: I couldn't get a 25-cent bond.

Mr. Blonder: The California By-Products is

certainly substantial. They can put up the [279] bond.

The Referee: If you want to try to get a bond, I will give you opportunity.

Mr. Seymour: I wouldn't risk $21,000 on it, because I don't have it. If I had to pay, I couldn't pay it.

The Referee: If you want time to take it up with the creditors and see if they will do that——

Mr. Seymour: We are not going to put up any bond.

The Referee: Do you want time?

Mr. Seymour: I don't want time for that, no, your Honor.

Mr. Blonder: May I ask Mr. Byrne, who represents Consolidated Casting Company, to make the statement that he has $21,000 in cash or cashier's check?

Mr. Byrne: I have here, your Honor, my check, which is certified, in the sum of $20,000, made out to Frank Chichester. That is on the condition that this is a final settlement.

The Referee: It has got to be in final settlement.

Mr. Shutan: I understand that Mr. Seymour filed certain papers in connection with objections to this hearing, and intends to file other papers. I would like the record to show my request and demand on Mr. Seymour that I receive copies of all pleadings and papers.

Mr. Seymour: May the record show that it is a pleasure.

Mr. Byrne: May the record show that I am

handing [280] Mr. Chichester this check, No. 446, and it is written on my client's account, James T. Byrne's client's account, and certified by the Bank of America, in the sum of $20,000.

Mr. Chichester: The Trustee acknowledges its receipt. I will deposit it in my Trustee Account and hold it.

The Referee: It will be clear that I am not deciding this matter at all, other than to grant this petition, unless some creditor or creditors are willing to guarantee this amount to the estate and take over the burden of the litigation.

Mr. Byrne: I understand this acceptance this morning makes it a final acceptance?

The Referee: It does, by the Trustee. I don't think you need to have much fear of that, because this Court and other courts have universally held that that is subject to the sound discretion of the Referee and will not be reversed except in case of plain abuse of discretion. If anybody can find abuse of discretion in the orders I make in that respect, they are welcome. Anything else on that?

Mr. Blonder: In this Superior Casting case, we have three 21-A examinations, in which I would like to examine Mr. Gage, Mr. Seymour, and Mr. John Gray.

(21-A examination of Mr. Gage omitted.)

The Referee: Mr. Blonder, Mr. Seymour and Mr. Gage have filed a demand upon the Trustee that actions be brought and objections to the proposed compromise, in which they [281] accuse you of neglect.

Mr. Blonder: That is the second time.

The Referee: Do you want to make a statement in regard to that?

Mr. Blonder: I would like to make a motion to strike that demand.

The Referee: No, I wouldn't grant that. But do you want the record to show what you have done in these matters, and why?

Mr. Blonder: In the first place, if there is anything we haven't done, it is because Mr. Seymour and Mr. Gage have deliberately refused to disclose information to us, and that is the reason we have had to bring 21-A proceedings to get information. We have examined, under 21-A proceedings, I believe, all the witnesses mentioned in that demand. If there is any witness that we didn't examine, the Trustee was still satisfied that he had sufficient information and could develop sufficient testimony on the hearing on objections on the Bill Lepper claim. The purpose of filing the objections to the Bill Lepper claim was to attempt to knock out completely their claim of $64,000. And that is what I understand Gage and Seymour want us to still do over again. We started that litigation, and now we are attempting to compromise. We think this is a reasonable compromise and suggest that it be accepted.

Insofar as the previous statement which they filed is concerned, accusing us of neglect, there was no neglect. [282] What Mr. Seymour and Mr. Gage didn't understand was that I was deliberately waiting for Bill Lepper to file his petition seeking the

$64,000, before I started by proceeding. As soon as they filed that petition, we conducted all these examinations sufficiently to, in my opinion, give us enough ammunition to conduct the lawsuit. Now the offer of compromise has come up, and they don't like it. They filed a demand to start litigation, and I state that, if all the facts they set forth in their demand are true, there is still evidently no cause of action. So that is the story, your Honor. We have done all we can.

The Referee: Have you examined this petition? Do you want to make a statement about it? Read that.

Mr. Blonder: I haven't examined that thoroughly.

The Referee: Well, you had better do that.

Mr. Blonder: All right, your Honor.

The Referee: We will recess for 10 minutes.

(Short recess.)

Mr. Blonder: Two documents were filed. One is objections to the proposed compromise, and one is a demand upon the Trustee that actions be brought. Does the Court desire a statement on both documents?

The Referee: Whatever you want to say.

Mr. Blonder: With respect to the purpose of the proposed compromise, the Court has read the verified petition of the Trustee. The only thing I want to say with [283] reference to the objection is that the accusation has been made that the Trustee failed to examine fully, or, in some cases, at all, various witnesses who have knowledge of the asserted fraud

on the part of Bill Lepper Motors, Inc., and, of these witnesses, I want to state for the record that I personally examined or interviewed Mr. Les Scherer, Mr. Walter Smith, Mr. Falkenberg, the president of Consolidated Casting Company, Mr. Harold J. Ackerman, Mr. George Kay and Mr. John Gray. There were also other witnesses who were examined under 21-a, or interviewed by myself, and those witnesses gave me sufficient information to institute the proceeding which is the basis for the petition to compromise. I did not either interview or examine Mr. Norton Sather, Mr. William Cullen or Mr. Homer Lewis. If it had been necessary those three individuals would have been subpoenaed for the hearing before the Court.

The Referee: Why didn't you examine them?

Mr. Blonder: With reference to Mr. Norton Sather, we did not discover who he was or where he was until the last 21-A proceedings, when I examined Mr. Laughlin. That was a few days before the hearing before the Court, and we knew who he was at that time. He was, we understood, working for Consolidated Casting, and he could have been gotten here within a few hours, which we would have done, if the proceeding had required it.

With reference to Mr. William Cullen and Mr. Homer [284] Lewis, I still don't know who they are. And I will state to the Court that I had several interviews with Mr. Seymour and Mr. Gage and attempted to get information concerning this

matter, and at no time did they ever mention to me the name of William Cullen or Homer Lewis.

But, be that as it may, your Honor, and going on now to this demand upon the Trustee that he institute certain actions, an analysis of this demand shows that what Messrs. Gage and Seymour are seeking is that some sort of action be instituted confirming all these transactions which are at issue in the matter which is now before the Court, and which is the basis for the petition to compromise. Sufficient facts have been set up by the Trustee in his answers and affirmative defenses to the claim of Bill Lepper Motors for $64,000. We set up, and are prepared to prove, those facts. The Court might not have agreed with our theory of the law. And it was in that particular proceeding that the petition to compromise has now been brought. The Trustee has already instituted the very proceedings which Gage and Seymour say now we should do but they say we haven't done it quite the way they want us to do it. They probably want us to institute primary proceedings. That was one of the reasons why I wanted to wait until Bill Lepper instituted a proceeding in this court to get the $64,000. In that way, by merely attacking his claim and setting up the affirmative defenses, we had the matter at issue before this Court on a [285] summary proceeding.

I will state to the Court also that I plan to file a written answer to this demand, so that the record will be clear on the point. And with reference to the pending proceedings now, I have one witness

to examine, Mr. John Gray, which will take only about five minutes. I want to find out what he knows about this situation.

Mr. Seymour: The hearing on the Lepper matter was continued to November 1st, at which time various witnesses were requested to return again unless they were notified to the contrary.

Mr. Blonder: I intend to do that.

Mr. Seymour: Mr. Gage and I would like to examine Messrs. Smith and Scherer at a 21-A examination, and I think it would be better that the Trustee would merely not notify them not to return on November 1st, and give us an opportunity to examine them.

Mr. Blonder: They were subpoenaed as witnesses.

The Referee: Have they been examined?

Mr. Blonder: They have not been examined, because we were just getting to that. I will be glad to examine them, if these creditors want that done, and I will call them and tell them that they have to be here then.

Mr. Seymour: Mr. Falkenberg, of Consolidated Casting, is another witness.

Mr. Byrne: The reason we offered the compromise was [286] because we——

The Referee: You need not go into that. If the creditors think the witnesses should be examined, and if you have no objection, go ahead.

Mr. Blonder: I have no objection. I know that, as far as Mr. Scherer and Mr. Smith are concerned, they will definitely testify as to the impropriety and

the fraudulent acts which occurred at the chattel mortgage foreclosure sale. Mr. Gage, I understand, has a letter from them to that effect. And so we are going to use them as witnesses in that particular hearing, and they are still under subpoena. I have no objection to examining them.

Mr. Byrne: On the offer of compromise, one of the prime motives of my offering this compromise, one of my prime purposes, was to stop the personalities. That is the reason I made the offer.

The Referee: Well, they can certainly examine these witnesses.

Mr. Byrne: But the matter has been compromised; they either accept my compromise, or they do not.

Mr. Blonder: May we ask Mr. Seymour and Mr. Gage what they think the Trustee may accomplish by examining these three witnesses? I disclosed what I know those witnesses will testify to. I disclosed what I will examine them about. I disclosed what I think they know and what they will testify to. I think it would be most appropriate for Mr. Seymour and [287] Mr. Gage to advise the Trustee, since he wants us to examine them, to tell us what they want to find out from these three individuals. I think it would be interesting to know that fact.

Mr. Seymour: You stated that it was your opinion that their testimony would be that the sale on the chattel mortgage was, in essence, fraudulent.

Mr. Blonder: Right.

Mr. Seymour: That is the purpose of my examination. If you will stipulate that that is what their

testimony would be, I will dispense with the examination.

Mr. Blonder: Mr. Seymour, or Mr. Gage, has letters in his possession—I want the record to show that Mr. Gage has letters in his possession, by Scherer and Smith, which state what they will testify to. He never showed them to me when I had him on 21-A proceedings several weeks ago, and he didn't tell me anything about it. If you want to know what they are going to testify to, let's see what they say. They have got it in writing, your Honor.

Mr. Seymour: I want to have their testimony as a part of the record.

The Referee: That is denied. I am not trying any issue raised on these charges. I am simply holding that this is a substantial offer, and I am going to approve it, unless you want to take over the litigation and guarantee that the estate will get that amount. [288]

Mr. Gage: Is it my understanding, your Honor, from what you said, that you are not concerned with whether there was fraud there or not?

The Referee: It isn't a question of my concern. It is a question of whether you want to take over the litigation or whether you don't.

Mr. Gage: That is your order?

The Referee: That is my order. That is not denying you any right whatever, provided you guarantee that the estate will get this money.

Mr. Blonder: May I proceed with the examination of Mr. Gray, your Honor?

The Referee: All right.

Mr. Blonder: May I ask you, for the record, Mr Seymour, do you know anything about Superio Casting Company of Texas which would enable th Trustee to get together any assets or funds for th benefit of the present bankrupt estate?

Mr. Seymour: I know nothing more than wha Mr. Gage testified to. What I do know I learne from him.

Mr. Blonder: All right. I am satisfied, for th record. Now, Mr. Gray.

(Examination of the witness John D. Gra omitted.)

Mr. Seymour: Do I understand, your Honor that these witnesses Scherer and Smith will be ex amined, the witnesses I mentioned before, Scherer and Smith, that we will have an [289] opportunity to examine them on the first?

The Referee: If you can uncover any assets, yes Otherwise it is a waste of time. But I am not going into the merits of the thing.

Mr. Seymour: We are desirous of knowing thei testimony and having it in the record. We do have an affidavit as to what they would say, and would like to have it in the record—that is Scherer and Smith and Falkenberg.

Mr. Chichester: That is in connection with the compromise?

The Referee: I am not concerned——

Mr. Seymour: But we are——

The Referee: Sit down. I am not concerned with

all these charges. Unless you can take over the litigation and guarantee that money to the estate, it would shock the conscience of any equity judge to do otherwise.

Mr. Seymour: For the record, I request that we be permitted to examine Mr. Walter Smith, one Les Scherer—I don't know Falkenberg's first name.

Mr. Blonder: William.

Mr. Seymour: And William Falkenberg, for the purpose of demonstrating by their evidence that the sale under the chattel mortgage was fraudulent.

The Referee: Maybe it is. I don't know.

Mr. Seymour: Well, but I want to get that in the record, and I request an opportunity to examine them for the [290] purpose of putting their evidence on the record.

Mr. Blonder: I have no objection, but it may hold up—I don't want that to hold up the compromise.

Mr. Chichester: I am afraid the compromise might be [291] lost. I have a $20,000 certified check in my possession, that I want to deposit to the account of the bankrupt estate. One of the reasons for making that offer in compromise was to terminate further litigation and further examination of witnesses, and a possible strain on friendship between individuals in this matter. That is one of the reasons why we have a substantial offer. If that offer is going to be jeopardized by trying to keep open these apparent wounds and bringing the whole matter back to the surface again, we can very well lose the compromise.

The Referee: I agree with that.

Mr. Blonder: May I suggest that we go ahea with the compromise, and your Honor rule, and i at any later date, we have to examine these wit nesses, they are still open for 21-A examination.

Mr. Gage: I take it, then, that this Court, fo purposes of this compromise, is not interested a to whether there was any fraud in the sale or not

The Referee: I am going to give you a chanc to go into it in the proper way, if you want to.

Mr. Gage: Just by bringing it up under 21-A your Honor?

Mr. Seymour: Just by putting up $21,000, you Honor?

The Referee: Well, I can't help that. I am no going to let you use the process of this court an ball this thing up so that we will get nothing i the end. [292]

Mr. Gage: Has the Court any objection to Mr Seymour and myself examining those two witnesse under 21-A tomorrow, before the date set for th compromise to be heard, November 1st?

Mr. Blonder: That November 1st date is just continuation of the litigation itself.

The Referee: If it is anything that would jeop ardize the compromise, we won't do it.

Mr. Chichester: I think that is right, you Honor.

Mr. Seymour: In other words, we may not d that, we may not examine any of these witnesses?

The Referee: That's right, upon the ground solely, that this compromise is intended to eliminat

all that. The offer is very substantial. And if you think you can do better by an assumption of the litigation, you can have the opportunity to take it over. You have refused to do so.

Mr. Seymour: I refused on one ground only, that I didn't have $21,000.

The Referee: We can't jeopardize the creditors by doing it. [293]

Certificate

I, C. W. McClain, hereby certify that on the 30th day of October, 1951, I attended and reported, as official court reporter, the proceedings in the above-entitled and numbered matter before the Honorable Reuben G. Hunt, Referee in Bankruptcy, in said Matter, and that the foregoing is a true and correct transcript of the proceedings had therein on said date, and that said transcript is a true and correct transcription of my stenographic notes thereof.

Dated at Los Angeles, California, this the 13th day of November, 1951.

/s/ C. W. McCLAIN,
Official Court Reporter.

[Endorsed]: Filed November 13, 1951, [294] Referee.

[Title of District Court and Cause.]

MINUTES OF THE COURT APRIL 4, 1952

Present: The Hon. Peirson M. Hall,
District Judge.

Nature of Proceedings:

Ex Parte

Submitted on March 10, 1952, on Petition of California By-Products Corp., E. F. Haven, Armand J. Pihlblad and Sonnet Supply Co., for Review of Order of Referee approving compromise.

Ruling

The Order of the Referee approving compromise is affirmed.

EDMUND L. SMITH,
Clerk.

By S. W. STACEY,
Deputy Clerk. [322]

In the District Court of the United States, Southern District of California, Central Division

No. 51460—PH

In the Matter of:

SUPERIOR CASTING COMPANY, INC., a California Corporation,

Bankrupt.

ORDER AFFIRMING ORDER OF REFEREE

In the above-entitled action, the Petitioners on Review, California By-Products Corp., a California Corporation; E. F. Haven, Armand J. Pihlblad, and Sonnett Supply Co., having heretofore filed their petition for review of the order of the Honorable Rueben G. Hunt, Referee in Bankrutpcy, dated November 15, 1951, and

The said Petitioner on Review, California By-Products Corp., having appeared by its attorney, Daniel W. Gage; and the Petitioners on Review, E. F. Haven, Armand J. Pihlblad and Sonnet Supply Co., having appeared by their attorney, Russell B. Seymour; and the Trustee herein, Frank M. Chichester, having appeared by his attorneys, Ehrlich & Blonder, by David Blonder; and

The parties hereto having filed their written memorandums on review; and the parties hereto having submitted said matter to this Court on March 10, 1952; and the matter having been duly considered by the Court;

It is hereby Ordered, Adjudged and Decreed:

That the order of the Honorable Rueben G. Hunt, Referee [323] in Bankruptcy, dated November 15, 1951, which order did approve a compromise by the Trustee of certain matters, is hereby affirmed.

Dated April 16, 1952.

/s/ PEIRSON M. HALL,
District Judge.

The above Order is approved as to form.
April ..., 1952.

.....,
Attorney for California By-Products Corp., a California Corporation.

April 9, 1952.

/s/ RUSSELL B. SEYMOUR,
Attorney for E. F. Haven, Armand J. Pihlblad, and Sonnet Supply Co.

Receipt of Copy acknowledged.

Docketed and entered April 16, 1952.

[Endorsed]: Filed April 16, 1952. [324]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that California By-Products Corporation, E. F. Haven, Armand J. Pihlblad and Sonnet Supply Co. and each of them

hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Minute Order of the Court herein, made and entered April 4, 1952, and from the formal Order, made and entered April 16, 1952, each of which orders approved and confirmed order of Reuben G. Hunt, Referee in Bankruptcy, dated November 15, 1951, approving petition of the Trustee in Bankruptcy for leave to compromise controversy purportedly existing between said Trustee in Bankruptcy and Bill Lepper Motors, Inc., and Consolidated Casting Co.

DANIEL W. GAGE, and

RUSSELL B. SEYMOUR,

By /s/ DANIEL W. GAGE,
Attorneys for Said
Appellants.

[Endorsed]: Filed May 2, 1952. [325]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men by These Presents, that the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Frank Chichester, Trustee in Bankruptcy for Superior Casting Company, Inc.,

a California Corporation, Bankrupt, in the above-entitled matter, in the penal sum of Two Hundred Fifty and No/100 Dollars ($250.00) to be paid to said Frank Chichester, Trustee in Bankruptcy for Superior Casting Company, Inc., a California Corporation, its successors, assigns, or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

The Condition of the Above Obligation Is Such, that

Whereas, the California By-Products Corporation, E. F. Haven, Armand J. Pihlblad, and Sonnet Supply Co. are about to take an appeal to the United States Court of Appeals for the Ninth Circuit from an appeal from minute order entered April 4, 1952, and from formal order entered April 16, 1952, each of which approved and confirmed order of Reuben G. Hunt, Referee in Bankruptcy, dated November 15, 1951, [326] approving petition of the Trustee in Bankruptcy for leave to compromise controversy existing between said Trustee in Bankruptcy and Bill Lepper Motors, Inc., and Consolidated Casting Co., by the United States District Court for the Southern District of California, Central Division, in the above-entitled action.

Now, Therefore, if the above-named Appellants, California By-Products Corporation, E. F. Haven, Armand J. Pihlblad, and Sonnet Supply Co., shall prosecute said appeal to effect and answer all costs

may be adjudged against him if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 2nd day of May, 1952.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

By /s/ ROBERT HECHT,
Attorney in Fact.

Examined and recommended for approval as provided in Rule 8.

/s/ RUSSELL B. SEYMOUR,
Attorney.

Approved this .... day of ....., 1952.

.....,
Judge. [327]

State of California,
County of Los Angeles—ss.

On this 2nd day of May, 1952, before me, S. M. Smith, a Notary Public, in and for the said County

of Los Angeles, State of California, residing therein duly commissioned and sworn, personally appeared Robert Hecht, known to me to be the Attorney-in Fact of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that he subscribed the name of the Fidelity and Deposit Company of Maryland thereto and his own name as Attorney-in-Fact.

[Seal] /s/ S. M. SMITH,
Notary Public in and for the County of Los Angeles State of California.

My Commission expires Feb. 18, 1954.

[Endorsed]: Filed May 2, 1952. [137-a]

[Title of District Court and Cause.]

PETITION AND AFFIDAVIT FOR ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL AND ORDER

State of California,
County of Los Angeles—ss.

Russell B. Seymour, being sworn, says: That he is one of the attorneys for California By-Products Corporation, et al., appellants, in respect to orders of the Court made under dates of April 4, 1952, and April 16, 1952, in connection with which a notice of appeal was filed on May 2, 1952. That designa

tion of orders of record on appeal has been filed by the appellants and the time for filing a counter-designation expires on or about June 11, 1952. That the time for filing the record and docketing the appeal expires on June 11, 1952. Affiant is advised by the Clerk of the Court that in view of the nature of the record additional time for filing the record and docketing the appeal will be required. [337]

Wherefore, it is prayed that an order be made extending the time for filing the record and docketing the appeal herein to and including July 1, 1952.

/s/ RUSSELL B. SEYMOUR.

Subscribed and sworn to before me this 9th day of June, 1952.

[Seal] /s/ EDITH CETTO,
Notary Public in and for
Said County and State.

It Is Ordered that the time for filing of record on appeal with the United States Court of Appeals for the Ninth Circuit and for docketing therein the appeal taken by the above-named appellants by notice of appeal filed May 2, 1952, be and hereby is extended to July 1, 1952, pursuant to Rule 73g of the Federal Rules of Civil Procedure.

Dated this 9th day of June, 1952.

/s/ PEIRSON M. HALL,
Judge of the District Court
of the United States.

[Endorsed]: Filed June 9, 1952. [338]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United State
District Court for the Southern District of Califor
nia, do hereby certify that the foregoing page
numbered from 1 to 338, inclusive, contain the orig
inal Creditors' Petition; Order of General Refer
ence; Adjudication of Bankruptcy and Order t
File Schedules; Bonds of Trustee; Certificate o
Referee on Review of Order Granting Petition t
Compromise Controversy and the thirty-two docu
ments certified therewith; Supplement to Certificat
of Referee on Review of Order Granting Petitio
to Compromise Controversy and the seven docu
ments certified therewith; Order Affirming Orde
of Referee; Notice of Appeal; Undertaking fo
Costs on Appeal; Statement of Points; Designatio
of Record on Appeal and Petition and Order Ex
tending Time to File Record and Docket Appeal
and a full, true and correct copy of Minutes of th
Court for April 4, 1952, which constitute the recor
on appeal to the United States Court of Appeal
for the Ninth Circuit.

I further certify that my fees for preparing an
certifying the foregoing record amount to $4.00
which sum has been paid to me by appellants.

Witness my hand and the seal of said Distric
Court this 23rd day of June, A.D. 1952.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13440. United States Court of Appeals for the Ninth Circuit. California By-Products Corporation, E. F. Haven, Armand J. Pihlblad and Sonnet Supply Co., Appellants, vs. Frank M. Chichester, Trustee in Bankruptcy of the Estate of Superior Casting Company, Inc., Bankrupt; Bill Lepper Motors, Inc., and Consolidated Casting Co., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 24, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13440

CALIFORNIA BY-PRODUCTS CORPORATION, E. F. HAVEN, ARMAND J. PIHLBLAD and SONNET SUPPLY CO.,

Appellants,

vs.

FRANK M. CHICHESTER, as Trustee of the Estate of Superior Casting Company, Inc., a California Corporation, Bankrupt,

Appellee.

STATEMENT OF POINTS
(Rule 75d)

The District Court erred in confirming the order of the Referee for each of the following reasons:

1. No evidence in support of the Trustee's petition was adduced by or on behalf of the Trustee.

2. The Referee refused to permit the objecting creditors to adduce any evidence in support of their objections to said petition for leave to compromise controversy.

3. No controversy existed between the Trustee and Consolidated Casting Co., and Bill Lepper Motors, Inc.

4. The Referee was not entitled to consider as evidence, at the hearing on the petition for leave to compromise controversy, any of the numerous docu-

ments listed on pages 2 to 7 of the Referee's Certificate, none of said documents having been offered in evidence at the hearing.

5. Where a chattel mortgage foreclosure sale was fraudulently conducted, Bill Lepper Motors, Inc., lost its right to obtain any deficiency on its single obligation secured both by a Chattel Mortgage and a Deed of Trust on the property of the bankrupt.

6. The Referee abused his discretion in requiring the objecting creditors to deposit a guarantee of $21,500.00 before he, the Referee, would consider the objections to the petition of the Trustee.

Dated this 15th day of July, 1952.

DANIEL W. GAGE, and
RUSSELL B. SEYMOUR,
By /s/ RUSSELL B. SEYMOUR,
Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 16, 1952.

No. 13440.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA BY-PRODUCTS CORPORATION, E. F. HAVEN, ARMAND J. PIHLBLAD, and SONNETT SUPPLY CO.,

Appellants,

vs.

FRANK M. CHICHESTER, Trustee in Bankruptcy of the Estate of Superior Casting Company, Inc., Bankrupt; BILL LEPPER MOTORS, INC., and CONSOLIDATED CASTING CO.,

Appellees.

BRIEF OF APPELLANTS.

DANIEL W. GAGE and
RUSSELL B. SEYMOUR,
458 South Spring Street,
Los Angeles 13, California,
Attorneys for Appellants.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbooks

No. 13440.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA BY-PRODUCTS CORPORATION, E. F. HAVEN, ARMAND J. PIHLBLAD, and SONNETT SUPPLY CO.,

Appellants,

vs.

FRANK M. CHICHESTER, Trustee in Bankruptcy of the Estate of Superior Casting Company, Inc., Bankrupt; BILL LEPPER MOTORS, INC., and CONSOLIDATED CASTING CO.,

Appellees.

BRIEF OF APPELLANTS.

Preliminary Statement.

This is an appeal by certain objecting creditors from a Minute Order and a formal order of the District Court of the United States, Southern District of California, Central Division, affirming an order of the Referee in Bankruptcy authorizing Frank M. Chichester, as Trustee in the Matter of Superior Casting Company, Inc., Bankrupt, to compromise a controversy between himself and Bill Lepper Motors, Inc., and Consolidated Casting Company, by which, among other things, the Trustee was to pay to Bill Lepper Motors, Inc., the sum of $63,444.07 and to receive from Consolidated Casting Company the sum of $20,000.00.

The appeal involves the questions of whether a Referee may make such an order in the face of written objections filed by creditors (1) without taking any evidence in support of the Trustee's petition, or (2) without permitting the objecting creditors to adduce any evidence in support of their objections, or (3) whether the Referee may summarily approve the proposed compromise unless the objecting creditors would deposit an indemnity to the estate in the amount of $21,500,00, and (4) whether there existed any legal controversy capable of being compromised.

Statement of Pleadings and Facts Showing Jurisdiction.

The bankruptcy was commenced on February 19, 1951, in the District Court of the United States, Southern District of California, Central Division, by the filing of a creditors' petition against the bankrupt herein, Superior Casting Company, Inc., a California corporation, under the provisions of Section 59 of the Bankruptcy Act. (11 U. S. Code, Chap. 6, Sec. 95.) [3]* Further proceedings were immediately referred generally to Reuben G. Hunt, Referee in Bankruptcy. [7] The corporation was adjudged bankrupt on April 13, 1951. [8] On June 14, 1951, Frank M. Chichester became the duly appointed, qualified and acting Trustee in Bankruptcy herein. [9] On June 14, 1951, an order was made by the Referee directing a sale by the Trustee of certain real property of the bankrupt free and clear of any lien asserted against the property by Bill Lepper Motors, Inc., and transferring such lien to the proceeds of such sale. [55, 57] On July 27, 1951, an order was made confirming a sale of said

---

*Indicates page of printed transcript of record.

real property for the sum of $75,000.00. [59] On October 15, 1951, the Trustee in Bankruptcy filed his petition for leave to compromise a controversy between himself and Bill Lepper Motors, Inc., and Consolidated Casting Company. [119] A hearing on the petition was had on October 30, 1951 [252], at which time the appellants filed written objections to the proposed compromise. [128] On November 15, 1951, Findings of Fact, Conclusions of Law and an Order approving the proposed compromise and overruling the objections of the appellants were entered by the Referee. [144] On November 23, 1951, appellants filed a petition for review under the provisions of Section 39c of the Bankruptcy Act (11 U. S. Code, Chap. 5, Sec. 67). [152] On February 8, 1952, the Referee filed his Certificate [14], and on February 15, 1952, filed a supplemental Certificate. [166] The petition for review was heard by a Judge of the United States District Court which on April 4, 1952, made and entered its Minute Order affirming the order of the Referee [272], and on April 16, 1952, made and entered its formal written order affirming the order of the Referee. [273] On May 2, 1952, notice of appeal from each of said orders [274] and a bond in the amount of $250.00 for costs on appeal [275] were filed by appellants. On June 9, 1952, an order was made by the District Court of the United States, pursuant to rule 73g of the Federal Rules of Civil Procedure extending to July 1, 1952, the time for filing of the record on appeal with this Court and for docketing therein the within appeal. [278] The record on appeal was filed and docketed June 24, 1952. [281] A statement of points was filed by appellants in this Court on July 16, 1952. [282]

The jurisdiction of the District Court of the United States was invoked upon the filing of the creditors' petition against the bankrupt in the United States District

Court for the Southern District of California, Central Division (Sec. 1 (10) of the Bankruptcy Act, 11 U. S. Code, Chap. 1, Sec. 1, and Sec. 2a of the Bankruptcy Act, 11 U. S. Code, Chap. 2, Sec. 11). The jurisdiction of the Referee in Bankruptcy was invoked by the general order of reference. (Bankruptcy Act, Sec. 38, 11 U. S. Code, Chap. 5, Sec. 66.) Jurisdiction of the District Court of the United States in respect to the petition for review is covered by Section 2a, subdivision 10, of the Bankruptcy Act (11 U. S. Code, Chap. 2, Sec. 11), and Section 39c of the same Act. (11 U. S. Code, Chap. 5, Sec. 67.) The jurisdiction of the United States Court of Appeals for the Ninth Circuit was invoked under Section 24 of the Bankruptcy Act (11 U. S. Code, Chap. 4, Sec. 47, and also by New Title, 28 U. S. Code, Sec. 1291).

Statement of the Case.

Superior Casting Company, Inc., the bankrupt, was adjudged bankrupt on April 13, 1951 [8], as a consequence of an involuntary petition filed February 19, 1951. [3] On June 14, 1951, Frank M. Chichester became the Trustee in Bankruptcy. [9] On the same day an order was made by the Referee in Bankruptcy to whom the matter had been referred directing a sale by the Trustee of certain real property of the bankrupt free and clear of the lien of a deed of trust held by Bill Lepper Motors, Inc., one of the appellees, and transferring the lien to the proceeds of such sale. [55] On July 27, 1951, a sale of the property was made by the Trustee for $75,000.00. [59] On September 11, 1951, Bill Lepper Motors, Inc., filed a petition requesting payment to it by the Trustee in Bankruptcy of $64,944.07 alleged to be due it on account of said lien. [91] On September 25, 1951, the Trustee filed an answer to said petition [94]

denying generally the various allegations of the petition and setting forth certain defenses: (1) that the amount owing did not exceed $61,609.78 [94-97]; (2) that at a date prior to bankruptcy Bill Lepper Motors, Inc., had sold for $1,500.00 under chattel mortgage foreclosure certain personal property worth $20,000.00 [97-99]; (3) that one Aleidis, purchaser of the real property from the bankrupt estate, was an agent for Bill Lepper Motors, Inc. [99]; (4) that Bill Lepper Motors, Inc., had converted certain other personal property of the value of $5,000.00 [99-100]; (5) that Bill Lepper Motors, Inc., and the bankrupt had arranged for the former to acquire the obligation of the bankrupt secured by the Deed of Trust and Chattel Mortgage and then to take over the business of the bankrupt through the agency Consolidated Casting Company, an adjunct of Bill Lepper Motors, Inc., at the expense of the bankrupt's creditors [100-101], and (6) that Bill Lepper Motors, Inc., acquired the obligation and Deed of Trust as agent of the bankrupt. [101]

Pursuant to order dated September 28, 1951 [110], the appellants also filed an answer and counterclaim to said petition the benefits of which were to redound to the estate in bankruptcy. [111] In said answer, among other things, it was alleged that the monies assertedly owing to Bill Lepper Motors, Inc., under its Deed of Trust were based upon the same obligation that was also secured by the aforesaid Chattel Mortgage [112] and that Bill Lepper Motors, Inc., on December, 1950, purportedly foreclosed the Chattel Mortgage under a sale at which "certain bidders made an opening bid on the said property in the amount of $5,000.00, which bid was increased by petitioner (Bill Lepper Motors, Inc.) or its nominee, and the opening bidder in successive advances of $500.00

each, until a bid of $9,000.00 was made by the original bidder. At this point, the petitioner or its agent paid to the original bidder the sum of $1,000.00 in consideration of the original bidder withdrawing his bid and refraining from further bidding. All previous bids were withdrawn and another bid in the amount of $1,500.00 was made by the petitioner, or its nominee, and the property was purportedly sold to the petitioner, or its nominee, for the sum of $1,500.00 which amount petitioner is endeavoring to credit the obligation of the bankrupt to the petitioner." [116]

A trial of the matter was commenced on October 2, 1951 [168], at which time the Referee refused to permit appellants to participate in the hearing.

> "The Referee: Do you want this creditor to collaborate with you?
>
> Mr Blonder: I don't need him, your Honor. As far as I am concerned, Mr. Seymour and Mr. Gage have done nothing but obstruct what the Trustee is attempting to do.
>
> The Referee: That is my view of it." [171]

> "Mr. Seymour: The Trustee, I understand, has enumerated his defenses to that trust deed and to the chattel mortgage. Now, on behalf of the creditors that have filed an answer here I would like to point out two theories of law—
>
> The Referee: I am not going to hear you on behalf of the creditors unless the Trustee want to collaborate with you." [186]

> "Mr. Seymour: Your Honor, there has been filed before this Court a document which if it be correct in my opinion makes an adverse interest between the counsel for the Trustee and these persons.
>
> The Referee: All right, I don't care about your opinions. You have got to point that out by some

proceeding. I am not going to permit you to come in and ball up this proceeding, Mr. Seymour, unless there is ground for it." [186]

"Mr. Gage: I move the witness' answer be stricken as not responsive.

The Referee: I am not going to hear from you. Motion denied. If the Trustee wants to make that, all right. You have to work through the Trustee, unless you show the Trustee isn't doing his duty." [209]

The trial was continued until October 4, 1952, after Bill Lepper Motors, Inc., had presented its *prima facie* case. [218]

After partial cross-examination of William S. Lepper, President of Bill Lepper Motors, Inc. [219-250] and before the matter was concluded [250] the entire matter was continued to November 1, 1952, with the intention that a petition to compromise would be heard in the interim. [250]

The petition to compromise [119] was filed by the Trustee, objections thereto were filed by the appellants [128], and a hearing had on October 30, 1951. [252-271] The reporter's transcript thereof is printed in the appendix. In substance some of the grounds for said objections [129] were:

(1) That the fraudulent sale under the chattel mortgage referred to in said petition* absolutely

*(*I. e.,* "that the said foreclosure sale was fraudulent and false and improperly conducted; that bidding was stifled at said sale; that the creditors of Superior Casting Company and the Trustee herein were damaged by said improper foreclosure sale to the extent that the credit that Bill Lepper Motors, Inc., should have allowed against its claim under the Trust Deed as aforesaid, should not have been the sum of $1,500.00 but should have been the actual value of the personal property foreclosed upon by Bill Lepper Motors, Inc., by said chattel mortgage forecloseure sale, plus certain supplies converted at said sale." [123])

eliminates any deficiency in favor of the obligation now held by Bill Lepper Motors, Inc., to wit: the asserted claim of Bill Leppers Motors, Inc., based on the Deed of Trust referred to in said petition of the Trustee. [129]

(2) That certain named witnesses had not been examined fully or in some cases at all in respect to the asserted fraud. [129]

(3) That the proposed compromise was not to the best interests of the estate. [130]

At the hearing held on October 30, 1951,

(1) The Trustee failed to adduce any evidence in support of his petition (unless perchance through the medium of "judicial notice"); see Reporter's Transcript, pages 252-271 set out in appendix, and paragraph II of Referee's Certificate [21].

(2) The Referee refused to permit the objecting creditors to adduce any evidence in support of their objections. See Reporter's Transcript at pages 267, 268, 270 (Appendix). See also Referee's Certificate [21];

(3) The Referee summarily refused to deny the petition to compromise unless the objecting creditors would deposit an indemnity to the estate to the extent of at least $21,500.00. See Referee's Certificate. [21] See also Reporter's Transcript at pages 252, 253, 254, 256, 258, 260 and 267. (Appendix.)

The order in question was made by the Referee on November 15, 1952. [144]

The Petition for Review was filed November 23, 1952. [152]

After the Petition for Review had been filed, the Referee orally required the appellants to obtain and file reporter's transcript of the partially completed proceeding held on the petition of Bill Lepper Motors, Inc., October 2 and 4, 1952, as a condition to the Referee preparing his Certificate on Review. (This requirement does not appear in the record, but it will be noted that the Reporter's Certificate on the transcript was made December 28, 1951 [251], the transcript was filed with the Referee on January 3, 1952 [251] and the Referee's Certificate was dated and filed February 8, 1952. [26].)

On February 8, 1952, the Referee's Certificate was filed and made a part of it were thirty-two different documents from the files of the entire bankruptcy proceeding. These are listed in Paragraph VI of the Certificate [23-26] and are printed at pages 26-165. None of these documents had been introduced into evidence at the hearing of October 30, 1951. [252-271]

On February 15, 1952, the Referee filed a Supplemental Certificate [166] and incorporated therein the reporter's transcript of the hearings had October 2 and 4, 1952, in connection with the petition of Bill Lepper Motors, Inc. [167-251] and the reporter's transcript of the hearing on October 30, 1952, in connection with the Petition to Compromise. [252-271] No part of the testimony adduced at the October 2, 1952, and October 4, 1952, hearings had been placed in evidence at the October 30, 1952, hearing on the Petition to Compromise. [252-271]

On April 4, 1952, the District Court entered its Minute Order [272] and on April 16, 1952, entered its formal order, affirming the order of the Referee. [273]

SPECIFICATION OF ERRORS RELIED UPON.

I.

The Referee Erred in Approving the Compromise in the Absence of Any Evidence Supporting the Petition of the Trustee for Leave to Compromise.

(No evidence was introduced at the hearing of the petition to compromise. See Referee's Certificate, paragraph II [21]; reporter's transcript of hearing. [252-271].)

II.

The Referee Erred in Approving the Compromise Without Permitting Objecting Creditors to Adduce Evidence of the Existence of Fraud in the Conduct of the Chattel Mortgage Foreclosure.

(The objecting creditors offered evidence in support of their written objections and at the hearing offered to prove by witnesses Smith, Scherer and Faulkenberg that the foreclosure of the chattel had been fraudulently conducted by stifled bidding in that after the bidding on the property involved had reached the sum of $9,000.00, Consolidated Casting Company and the agents in charge of the sale paid the only other bidder $1,000.00 not to make a bid; that the $9,000.00 bid was then withdrawn and the property sold to Consolidated Casting Company for $1,500.00, which was the amount credited on the obligation, the remainder of which is the subject matter of the present proceeding. This offer was refused by the Referee. Referee's Certificate, paragraph II [21]; Reporter's Transcript [256, 266, 267, 268 and 269]. The

attorney for the Trustee stated that in his opinion the testimony offered would show that the sale under the chattel mortgage was, in essence, fraudulent. [266]. In addition the Referee stated that he was not concerned with any evidence of fraud and made that his order. [267, 270])

III.

The Referee Erred in Considering as Evidence Numerous Documents and Testimony Not Adduced at the Hearing on the Petition to Compromise.

(These documents consisted of thirty-two items listed in paragraph VI of the Referee's Certificate [23-26] and are printed at pages 26-165. He likewise, considered the Reporter's Transcript of October 2 and 4, 1952. [167-251].)

IV.

The Referee Erred in Refusing to Consider the Objections of Appellants Unless They First Would Deposit as Indemnity the Sum of $21,500.00.

V.

The Referee Erred in Finding That a Controversy Existed Between the Trustee and Consolidated Casting Company and Bill Lepper Motors, Inc., for the Reason That No Collection of a Deficiency Can Be Made by a Mortgagee on an Obligation Secured by a Chattel Mortgage Which Has Been Improperly or Fraudulently Foreclosed.

SUMMARY OF ARGUMENT.

POINT I.

The Referee Erred in Approving the Compromise in the Absence of Any Evidence Supporting the Petition of the Trustee for Leave to Compromise.

A. To sustain findings and order approving a petition for leave to compromise a controversy, a Referee must have received substantial evidence warranting his action.

B. No evidence was received by the Referee.

(1) The record is barren of any evidence actually adduced at the hearing on the petition to compromise.

(2) A Referee in an adversary proceeding may not consider evidence not offered at the hearing.

POINT II.

The Referee Erred in Approving the Compromise Without Permitting Objecting Creditors to Adduce Evidence of the Existence of Fraud in the Conduct of the Chattel Mortgage Foreclosure.

A. The Referee should have permitted the objecting creditors to present evidence to support their objections to the proposed compromise.

POINT V.

The Referee Erred in Finding That a Controversy Existed Between the Trustee and Consolidated Casting Company and Bill Lepper Motors, Inc., for the Reason That No Collection of a Deficiency Can Be Made by a Mortgagee on an Obligation Secured by a Chattel Mortgage Which Has Been Improperly or Fraudulently Foreclosed.

A. Unless there be a substantial controversy, the Referee may not approve a petition to compromise.

B. A fraudulently conducted chattel mortgage foreclosure bars recovery of any deficiency under the obligation secured by the chattel mortgage.

C. Proof by the objecting creditors of fraudulent foreclosure if uncontroverted by substantial evidence would have rendered it improper for the Referee to find that a controversy existed, capable of compromise.

D. There is no proof or intimation of proof that the chattel mortgage foreclosure sale was not fraudulently conducted.

POINT III.

The Referee Erred in Considering as Evidence Numerous Documents and Testimony Not Adduced at the Hearing on the Petition to Compromise.

A. A Referee in an adversary proceeding may not consider evidence not offered at the hearing.

POINT IV.

The Referee Erred in Refusing to Consider the Objections of Appellants Unless They First Would Deposit as Indemnity the Sum of $21,500.00.

The action of the Referee was abuse of discretion since no evidence had been received in support of or in opposition to the proposed compromise.

ARGUMENT.

Preliminary Remarks.

1. The appellants have no quarrel with the general proposition that a Referee in Bankruptcy may in his sole discretion, legally exercised, authorize a compromise of a controversy between a Trustee and a third person and that the Referee's decision should not be set aside except for clear error or abuse of discretion.

We suggest, however, and shall endeavor to demonstrate as applicable to these proceedings, that before a Referee shall exercise his discretion he must have before him at least some evidence which will permit him to find that a substantial controversy does exist and then, having made that finding, to find that the proposed compromise will be to the best interests of the estate.

2. The record in this case is, in our opinion, unduly lengthy, being some two hundred eighty-three pages. Part of the reason may be our fault. If so, we apologize. However, as may be observed, the Referee attached to his Certificate on Review [23] thirty-two documents [26-165] none of which had been introduced or offered into evidence at the compromise hearing; and as part of a supplemental Certificate on Review [166] filed a Reporter's Transcript of hearing had on October 2 and 4, 1951 [167-251], which had not been introduced or offered into evidence at the compromise hearing on October 30, 1951, and which, so far as we can see, bears no relationship to the compromise.

Fearful that we might be charged with failure to produce all evidence taken before the trial court, we caused the entire record, as claimed by the Referee, to be filed

in this Court. We did endeavor to print in narrative form a major portion of the Reporter's Transcript, but the appellees insisted upon the literal transcript.

POINT I.

The Referee Erred in Approving the Compromise in the Absence of Any Evidence Supporting the Petition of the Trustee for Leave to Compromise.

A. To Sustain Findings and Order Approving a Petition for Leave to Compromise a Controversy, a Referee Must Have Received Substantial Evidence Warranting His Action.

In re California Associated Products Co., 183 F. 2d 946, decided by this Court August 12, 1950, a matter involving a compromise of a controversy, the order of the District Court was reversed because the Judge had made findings different from those of the Referee *without taking additional testimony.*

In re Peppers Fruit Co., 24 Fed. Supp. 119, the Court reversed an order of the Referee approving a compromise because no evidence had been presented by the Trustee to support his petition. The Court there stated "in these compromise matters, where objection is made, even by only a small creditor, substantial evidence should be produced by the opposing parties in order that the Referee may carefully consider the merits or demerits of the proposed compromise."

In *In the Matter of Niagara Falls Milling Company, Bankrupt,* 34 Fed. Supp. 801, the Court reversed the order of the Referee approving a compromise because no evidence had been submitted before the Referee to show

the basis and the reasonableness of the compromise. This was done even though the objecting creditor did not ask for an examination before the Referee.

B. No Evidence Was Received by the Referee.

(1) THE RECORD IS BARREN OF ANY EVIDENCE ACTUALLY ADDUCED AT THE HEARING ON THE PETITION TO COMPROMISE.

The Referee in his Certificate on Review states that no evidence was received (other than certain documents of which the Referee took "judicial notice"). [21] Reference is made also to the Reporter's Transcript of the hearing of October 30, 1951, set out in the appendix. [252-271]

(2) A REFEREE IN AN ADVERSARY PROCEEDING MAY NOT CONSIDER EVIDENCE NOT OFFERED AT THE HEARING.

The correct rule respecting the area included in "judicial notice" is set out in *Matter of Aughenbaugh,* 125 F. 2d 887, where, as here, a mortgagee was endeavoring to obtain the amount of his claim from proceeds of a sale of real estate free and clear. In view of the similarity of facts, we quote freely from that case.

> "In passing upon this question we may consider only the evidence which was presented to the referee at the hearing upon the trustee's exceptions to the mortgagee's priority claim. We may not consider other evidence which may have been in the files of the referee in the bankruptcy administration proceeding. To hold otherwise would be to violate the fundamental concept of procedural due process that a party to litigation is entitled to have the evidence relied upon by his opponent presented at the hearing

of his case so that he may have opportunity to cross-examine his opponent's witnesses and to offer evidence in rebuttal.

"Although the exceptions of the trustee to the priority claim of the mortgagee were filed in the general bankruptcy proceeding they raised a distinct controversy for determination by the referee which it was his duty to treat as an independent litigation, summary in form it is true, and to consider solely upon the evidence presented at the trial of that issue. If the Trustee desired to rely upon any papers already on file in the bankruptcy proceeding it was incumbent upon him to offer them at the hearing of his exceptions in order that the mortgagee might know that they were being relied upon and might have an opportunity to meet them with such other evidence as might be available to it."

"Our examination of the record indicates that the referee reached his decision from a consideration not only of the evidence offered at the hearing upon the trustee's exceptions but also of the bankruptcy schedules, the official appraisal, the proofs of claim, the return of sale and perhaps other papers on file in the bankruptcy administration proceeding, none of which was offered in evidence. It is true that the papers in this file so far as relevant would have been admissible as court records without other proof and would if offered in evidence have constituted some evidence of the facts to which they related. But the facts to which they related, being disputed in the very controversy under consideration, were not the sort of facts of which the referee was entitled to take judicial notice."

See *Matter of George-Grenatti Associates, Inc.*, 26 Fed. Supp. 952, where the Court reversed the Referee because, among other reasons, the Referee considered testi-

mony heard earlier and not referred to at the hearing and stated that a compromise would be a futility if the Referee may base his approval of the compromise on matters already known to him but not brought out at the meeting and that the Referee should have confined himself to facts stated in the petition and facts developed at the meeting.

POINT II.

The Referee Erred in Approving the Compromise Without Permitting Objecting Creditors to Adduce Evidence of the Existence of Fraud in the Conduct of the Chattel Mortgage Foreclosure.

A. The Referee Should Have Permitted the Objecting Creditors to Present Evidence to Support Their Objections to the Proposed Compromise.

In re Peppers Fruit Company, 24 Fed. Supp. 119, *supra,* the Court stated that the Referee should "receive and consider such competent evidence relating to the subject matter of these two pieces of litigation as may be presented by the parties sponsoring or opposing the proposed compromise."

In re California Associated Products Co., 183 F. 2d 946, *supra,* it is evident that the Court contemplated that evidence should be received by the parties favoring or objecting to the compromise in order that the Court might make appropriate findings that a compromise existed and that the approval thereof to be to the best interests of the estate.

In the *Matter of Niagra Falls Milling Company, Bankrupt,* 34 Fed. Supp. 801, *supra,* the Court in reversing the Referee stated that the objecting creditors could present such testimony as might be advisable.

See also:

Matter of Aughenbaugh, 125 F. 2d 887, *supra.*

POINT V.

The Referee Erred in Finding That a Controvers Existed Between the Trustee and Consolidate Casting Company and Bill Lepper Motors, Inc for the Reason That No Collection of a Deficienc Can Be Made by a Mortgage on an Obligatio Secured by a Chattel Mortgage Which Has Bee Improperly or Fraudulently Foreclosed.

A. Unless There Be a Substantial Controversy, the Refer May Not Approve a Petition to Compromise.

See *Truscott Boat & Dock,* 92 Fed. Supp. 430, whe even though a full hearing had been had in respect the merits of a petition in reclamation the District Cou reversed the Referee because the evidence presente showed conclusively that a certain chattel mortgage wa void as against the trustee.

Collier on Bankruptcy, 14th Ed. page 101 of 19 Supp. to Vol. II, comments on the *Truscott* case as fo lows:

> "However, wherever there is no controversy compromise because the material facts and the appl cable law are clearly established, approval of a pu ported compromise is an abuse of discretion."

See also *In re California Associated Products Co.,* 1 F. 2d 946, *supra,* where this Court reversed the Distri Court and affirmed the Referee in Bankruptcy only b cause controverted evidence existed.

B. A Fraudulently Conducted Chattel Mortgage Foreclosu Bars Recovery of Any Deficiency Under the Obligatio Secured by the Chattel Mortgage.

The objecting creditors in their objections [129] i cluded by reference the Trustee's statements in his petitio for leave to compromise [122-123], statements to the e

fect that the amount being claimed by Bill Lepper Motors, Inc., was the remainder of an obligation originally secured by a chattel mortgage and by a deed of trust and that the foreclosure sale under the chattel mortgage had been fraudulently conducted and that the bidding thereat had been stifled. As previously pointed out, the Referee's refused to hear any evidence in this connection. Referee's Certificate, paragraph II [21], Reporter's Transcript [256, 266, 267, 268 and 269]. The attorney for the Trustee stated that in his opinion the testimony offered would show that the sale under the chattel mortgage was, in essence, fraudulent [266] and the Referee stated that he was not concerned with any evidence of fraud and made that his order. [267, 270]

At no place has the Trustee even intimated that any evidence to the contrary would or could be adduced. Therefore, our discussion will be premised on the assumption that the chattel mortgage foreclosure sale was fraudulently conducted.

A Sale Having Been Improperly Conducted, No Collection of Any Deficiency Can Be Had.

Metheny v. Davis, 107 Cal. App. 137, appears to be the leading case on this point and holds squarely that under similar condition, as in this case, a mortgagee can not recover on any balance owing under the original obligation.

This would be true even though the remaining obligation existing after foreclosure of the chattel mortgage co-

incidentally were secured by a deed of trust. See *Trowbridge v. Love,* 58 Cal. App. 2d 746, where the Court denied enforcement of a deed of trust and stated:

> "If the deed of trust should be enforced, the cancellation of the note would be of no consequence. It would mean that the decree cancelled the indebtedness but that it must be paid to the Cyrus estate despite that fact."

To paraphrase the quoted portion of the *Trowbridge* case, we say:

> "If the deed of trust should be enforced, the fraudulent foreclosure would be of no consequence. It would mean that the fraudulent foreclosure prevented a deficiency but that the deficiency must be paid to Bill Lepper Motors, Inc., despite that fact."

See also *Coon v. Shry,* 209 Cal. at 615, where the Court said:

> "The situation seems to be a point of first impression, not only in this jurisdiction, but in any other, no case having been found directly in point, where a mortgage was given as security for such a gift. However, we have no hesitancy in holding, in accordance with well-settled principles, that the mortgage must stand or fall with the note. It is well settled in California that a mortgage or mortgage lien is a mere incident of the debt or obligation which it is given to secure. (Cal. Civ. Code, sec. 2909; 17 Cal. Jur. 710, sec. 27, and cases cited in footnote 11.) There cannot be a mortgage if there is no debt or other obligation to be secured. (Holmes v. Warren, 145 Cal. 457, 463 (78 Pac. 954); Todd v. Todd, 164 Cal. 255, 258 (128 Pac. 413); Ahern v. McCarthy, 107 Cal. 382, 386 (40 Pac. 482).) A

mortgage in California has no existence independent of the thing secured by it. (Estate of Fair, 128 Cal. 607, 613 (61 Pac. 184); People v. Eastman, 25 Cal. 601, 603.) As distinguished from the debt the mortgage has no determinate value. (Nagle v. Macy, 9 Cal. 426.)

From the above analysis it necessarily follows that since the note, evidencing the debt, is void, being a mere unenforceable promise to make a gift in the future, the mortgage must fall with the note, and must be declared to be void."

C. Proof by the Objecting Creditors of Fraudulent Foreclosure Bars Recovery of Any Deficiency Under the Obligation Secured by the Chattel Mortgage.

We believe that this portion of the argument has been covered in Point B above.

D. There Is No Proof or Intimation of Proof That the Chattel Mortgage Foreclosure Sale Was Not Fraudulently Conducted.

At no point has the Trustee urged that the chattel mortgage foreclosure sale was not fraudulently conducted and he has not urged that there was any proof to the contrary.

POINT III.

The Referee Erred in Considering as Evidence Numerous Documents and Testimony Not Adduced at the Hearing on the Petition to Compromise.

A. A Referee in an Adversary Proceeding May Not Consider Evidence Not Offered at the Hearing.

This point, we believe, is covered under Point I, B, (2).

POINT IV.

The Referee Erred in Refusing to Consider the Objections of Appellants Unless They First Would Deposit as Indemnity the Sum of $21,500.00.

The action of the Referee was abuse of discretion since no evidence had been received in support of or in opposition to the proposed compromise.

This point is only a corollary to the proposition that the Trustee must receive evidence in favor of or against a proposed compromise.

We will concede that if the Referee had first accepted testimony of sufficient character to permit him to approve the compromise, then in the alternative he might have made his order denying the petition on condition that the objecting creditors would indemnify the estate.

Conclusion.

Appellants urge that the orders of the District Court and of the Referee from which this appeal is taken should be reversed.

Respectfully submitted,

DANIEL W. GAGE and
RUSSELL B. SEYMOUR,

By RUSSELL B. SEYMOUR,

Attorneys for Appellants.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON HEARING ON PETITION TO COMPROMISE CONTROVERSY

Appearances:

For the Trustee:
DAVID BLONDER, ESQ.

For Bill Lepper Motors:
ROBERT H. SHUTAN, ESQ.

For Certain Creditors:
RUSSELL B. SEYMOUR, ESQ.

For Certain Creditors:
DANIEL W. GAGE, ESQ.

For Consolidated Casting Co.:
JAMES T. BYRNE, ESQ. [272]

Tuesday, October 30, 1951—10:30 A. M.

The Referee: We will now take up the Superior Casting Company case.

Mr. Blonder: Your Honor, this morning we have a hearing on the offer of compromise. Is there objection, Mr. Seymour and Mr. Gage?

Mr. Seymour: There is. We have filed objections to it, and have served a copy on Mr. Blonder.

Mr. Blonder: The copy was served on me in the courtroom this morning.

The Referee: I have gone over this. I am in favor of the compromise. But if this creditor wants to assume the burden of contesting the matter, it can, and can take its chances. I am going to rule in favor of the compromise.

Mr. Seymour: I appreciate your Honor's views. But it happens that we are all out of money and we have nothing left to put up a bond with.

Mr. Blonder: The same position was taken when these same gentlemen attempted to prevent the sale of the real estate for $75,000. At that time they said they didn't want it sold, because of certain things, and we told them that if they would come up with an offer of a certain amount in cash it might be different, and they came up with the same answer, "Fresh out of money." So we sold the property for $75,000, and now they are complaining about the offer to [273] compromise. I would like to see something to back up these continuous complaints.

The Referee: I am not stating what I will do. Mr. Shutan, are you in favor of or against the compromise?

Mr. Shutan: I am in favor of the compromise.

Mr. Blonder: I think there are some creditors in the courtroom also that the Court may be interested in hearing from.

Mr. George B. Kay: The American Smelting & Refining Company, approximately $25,000.

The Referee: You have the same privilege, if you want to guarantee that amount to the estate or to take over the burden of litigating this matter.

Mr. Kay: I would be in favor of it, but I don't want to take it over.

The Referee: I have seen too many offers of this kind that came to nothing, because of a situation

like this, unless some creditor wanted to take the burden over.

Mr. Blonder: Are there any other creditors in the courtroom? (Pause.) Evidently not.

Mr. Seymour: I want your Honor to understand everything that is going to take place. We are going to review this matter.

The Referee: You don't have much chance, because all the decisions are against you.

Mr. Seymour: May I make a short argument, then, that [274] may have some weight?

The Referee: No use making an argument. If you can take over the burden here, all right. Otherwise I am going to approve this compromise.

Mr. Seymour: Even though, your Honor, on the facts stated in the petition, I can demonstrate to your Honor that they are not entitled to do it? Will your Honor listen to me?

The Referee: I can't help it. We have got the offer.

Mr. Seymour: Even if I can show your Honor that we can get, under the law, under the facts admitted—

The Referee: I don't know what might come out of the litigation. Nobody knows. The outcome of a lawsuit can never be demonstrated in advance.

Mr. Seymour: Let me make about a two or three-minute speech here. I like to make speeches.

The Referee: All right.

Mr. Seymour: The evidence that has been partially adduced before this Court is to the effect that there was a fraud in connection with the sale of

this chattel mortgage. I don't know whether your Honor happened to be in the courtroom when that evidence was taken.

The Referee: There is no evidence of fraud yet.

Mr. Seymour: Your Honor hasn't been here and heard it all.

The Referee: Just answer my question.

Mr. Seymour: There has been evidence of substantial [275] fraud here.

The Referee: Before me?

Mr. Seymour: The Court started it, and then there was a 21-A examination, and whether or not Mr. Blonder pointed the situation out to you I don't know, but I would like to point it out to you.

Mr. Blonder: You said sometime previously that there were no 21-A examinations. Are you stating now that there were?

Mr. Seymour: I am stating they were partially conducted. The point is that there is evidence before this Court under that 21-A examination, and Mr. Blonder knows it.

The Referee: I know all that. But do we want to lose this offer?

Mr. Seymour: I am going on this assumption, that there is evidence—

The Referee: I don't care about that. Suppose we follow your course, and in the end we lose. Do you mean to say that we will then lose the benefit of this compromise offer? That is what I want to know. There is a prior case on this.

Mr. Seymour: I don't think so.

The Referee: Now, stick to that. You have an opportunity to guarantee this thing and take it over.

Mr. Seymour: May I ask your Honor if your Honor is familiar with the fact that there was a bid of $9,000 made [276] for this chattel mortgage property, and that the bidders, to wit, Consolidated Casting, and the agents in charge at that sale, paid one bidder $1,000 not to make a bid? Is your Honor familiar with that?

Mr. Blonder: I stated to your Honor in my opening statement that that would be the evidence we would adduce. All the facts upon which the Trustee based his objection to the claim of $64,000 were certainly adduced before your Honor on the trial. After the morning session they came through with this offer. The offer is $20,000 in cash, plus $1,500 to be deducted from the amount of the Bill Lepper claim, so, in effect, the estate is gaining $21,500. That is the net result of the offered compromise.

The Referee: You have your remedy here.

Mr. Seymour: I would like to have your Honor read the case of Metheney vs. Davis, 107 Cal. App. page 137, which holds that where there has been fraud in connection with a chattel mortgage, that the holder of that obligation is not entitled to recover.

The Referee: Well, then, you take it over.

Mr. Seymour: I don't have $21,000.

The Referee: Then the petition is granted. Objection overruled.

Mr. Blonder: May the record show that there

was a creditor in the court approving it, the creditor being American Smelting & Refining Company, Federated Metals [277] Division of American Smelting & Refining Company, whose claim is approximately $25,000? That is represented by Mr. Kay. This creditor is an unsecured creditor.

Mr. Seymour: May the record also show that demand was made upon the Trustee that objections be brought to that very same claim that counsel is talking about.

The Referee: All right.

Mr. Blonder: Your Honor, with reference to the demand this morning, would it be appropriate at this time for the Trustee to make a motion to strike that demand, for the reason that it does not state any facts sufficient to constitute the basis for the claim of Mr. Seymour is asserting?

The Referee: I would rather you would get a formal order.

Mr. Blonder: These documents were filed this morning, and this is the first time we have seen them.

Mr. Seymour: I would like to have findings.

Mr. Blonder: I will submit them for approval, and if they are not good enough, I am sure somebody can correct them. I am wondering if, in view of the fact that Mr. Seymour threatens review, if it might not be advisable to take testimony in the matter.

The Referee: You can do whatever you want to.

Mr. Seymour: May we offer testimony, too, your Honor?

The Referee: I am not deciding this now. I am giving the objecting creditor or creditors the right to take this [278] litigation over, provided they will guarantee this estate in the end that it will protect the estate, so that, in the end, the estate will get this much.

Mr. Blonder: I believe we should include that particular phase of it in the findings, then. I will make it part of the order, that if the petitioning creditors want to take over the litigation—

The Referee: The order can provide that they were given that privilege, but that they refused to take it over.

Mr. Blonder: May I ask at the present time if Mr. Gage, who represents certain other objecting creditors, whether or not he, on behalf of his clients, also refuses this offer which is being given to him by the Court?

Mr. Gage: That is correct.

Mr. Blonder: May the record show that Mr. Gage also refuses the offer suggested by the Court?

The Referee: Mr. Seymour and Mr. Gage object.

Mr. Seymour: I will take it over if we don't have to put up $21,000.

The Referee: Well, you don't want to put up anything. You want the other creditors to gamble with you, and they don't want to. Of course, you wouldn't have to put up cash. You could put up a bond.

Mr. Seymour: I couldn't get a 25-cent bond.

Mr. Blonder. The California By-Products is

certainly substantial. They can put up the [279] bond.

The Referee: If you want to try to get a bond, I will give you opportunity.

Mr. Seymour: I wouldn't risk $21,000 on it, because I don't have it. If I had to pay, I couldn't pay it.

The Referee: If you want time to take it up with the creditors and see if they will do that—

Mr. Seymour: We are not going to put up any bond.

The Referee: Do you want time?

Mr. Seymour: I don't want time for that, no, your Honor.

Mr. Blonder: May I ask Mr. Byrne, who represents Consolidated Casting Company, to make the statement that he has $21,000 in cash or cashier's check?

Mr. Byrne: I have here, your Honor, my check which is certified, in the sum of $20,000, made out to Frank Chichester. That is on the condition that this is a final settlement.

The Referee: It has got to be in final settlement.

Mr. Shutan: I understand that Mr. Seymour filed certain papers in connection with objections to this hearing, and intends to file other papers. I would like the record to show my request and demand on Mr. Seymour that I receive copies of all pleadings and papers.

Mr. Seymour: May the record show that it is a pleasure.

Mr. Byrne: May the record show that I am

handing [280] Mr. Chichester this check, No. 446, and it is written on my client's account, James T. Byrne's client's account, and certified by the Bank of America, in the sum of $20,000.

Mr. Chichester: The Trustee acknowledges its receipt. I will deposit it in my Trustee Account and hold it.

The Referee: It will be clear that I am not deciding this matter at all, other than to grant this petition, unless some creditor or creditors are willing to guarantee this amount to the estate and take over the burden of the litigation.

Mr. Byrne: I understand this acceptance this morning makes it a final acceptance?

The Referee: It does, by the Trustee. I don't think you need to have much fear of that, because this Court and other courts have universally held that that is subject to the sound discretion of the Referee and will not be reversed except in case of plain abuse of discretion. If anybody can find abuse of discretion in the orders I make in that respect, they are welcome. Anything else on that?

Mr. Blonder: In this Superior Casting case, we have three 21-A examinations, in which I would like to examine Mr. Gage, Mr. Seymour, and Mr. John Gray.

(21-A examination of Mr. Gage omitted.)

The Referee: Mr. Blonder, Mr. Seymour and Mr. Gage have filed a demand upon the Trustee that actions be brought and objections to the proposed compromise, in which they [281] accuse you of neglect.

Mr. Blonder: That is the second time.

The Referee: Do you want to make a statement in regard to that?

Mr. Blonder: I would like to make a motion to strike that demand.

The Referee: No, I wouldn't grant that. But do you want the record to show what you have done in these matters, and why?

Mr. Blonder: In the first place, if there is anything we haven't done, it is because Mr. Seymour and Mr. Gage have deliberately refused to disclose information to us, and that is the reason we have had to bring 21-A proceedings to get information. We have examined, under 21-A proceedings, I believe, all the witnesses mentioned in that demand. If there is any witness that we didn't examine, the Trustee was still satisfied that he had sufficient information and could develop sufficient testimony on the hearing on objections on the Bill Lepper claim. The purpose of filing the objections to the Bill Lepper claim was to attempt to knock out completely their claim of $64,000. And that is what I understand Gage and Seymour want us to still do over again. We started that litigation, and now we are attempting to compromise. We think this is a reasonable compromise and suggest that it be accepted.

Insofar as the previous statement which they filed is concerned, accusing us of neglect, there was no neglect. [282] What Mr. Seymour and Mr. Gage didn't understand was that I was deliberately waiting for Bill Lepper to file his petition seeking the

$64,000, before I started by proceeding. As soon as they filed that petition, we conducted all these examinations sufficiently to, in my opinion, give us enough ammunition to conduct the lawsuit. Now the offer of compromise has come up, and they don't like it. They filed a demand to start litigation, and I state that, if all the facts they set forth in their demand are true, there is still evidently no cause of action. So that is the story, your Honor. We have done all we can.

The Referee: Have you examined this petition? Do you want to make a statement about it? Read that.

Mr. Blonder: I haven't examined that thoroughly.

The Referee: Well, you had better do that.

Mr. Blonder: All right, your Honor.

The Referee: We will recess for 10 minutes.

(Short recess.)

Mr. Blonder: Two documents were filed. One is objections to the proposed compromise, and one is a demand upon the Trustee that actions be brought. Does the Court desire a statement on both documents?

The Referee: Whatever you want to say.

Mr. Blonder: With respect to the purpose of the proposed compromise, the Court has read the verified petition of the Trustee. The only thing I want to say with [283] reference to the objection is that the accusation has been made that the Trustee failed to examine fully, or, in some cases, at all, various witnesses who have knowledge of the asserted fraud

on the part of Bill Lepper Motors, Inc., and, of these witnesses, I want to state for the record that I personally examined or interviewed Mr. Les Scherer, Mr. Walter Smith, Mr. Falkenberg, the president of Consolidated Casting Company, Mr. Harold J. Ackerman, Mr. George Kay and Mr. John Gray. There were also other witnesses who were examined under 21-a, or interviewed by myself, and those witnesses gave me sufficient information to institute the proceeding which is the basis for the petition to compromise. I did not either interview or examine Mr. Norton Sather, Mr. William Cullen or Mr. Homer Lewis. If it had been necessary those three individuals would have been subpoenaed for the hearing before the Court.

The Referee: Why didn't you examine them?

Mr. Blonder: With reference to Mr. Norton Sather, we did not discover who he was or where he was until the last 21-A proceedings, when I examined Mr. Laughlin. That was a few days before the hearing before the Court, and we knew who he was at that time. He was, we understood, working for Consolidated Casting, and he could have been gotten here within a few hours, which we would have done, if the proceeding had required it.

With reference to Mr. William Cullen and Mr. Homer [284] Lewis, I still don't know who they are. And I will state to the Court that I had several interviews with Mr. Seymour and Mr. Gage and attempted to get information concerning this

matter, and at no time did they ever mention to me the name of William Cullen or Homer Lewis.

But, be that as it may, your Honor, and going on now to this demand upon the Trustee that he institute certain actions, an analysis of this demand shows that what Messrs. Gage and Seymour are seeking is that some sort of action be instituted confirming all these transactions which are at issue in the matter which is now before the Court, and which is the basis for the petition to compromise. Sufficient facts have been set up by the Trustee in his answers and affirmative defenses to the claim of Bill Lepper Motors for $64,000. We set up, and are prepared to prove, those facts. The Court might not have agreed with our theory of the law. And it was in that particular proceeding that the petition to compromise has now been brought. The Trustee has already instituted the very proceedings which Gage and Seymour say now we should do, but they say we haven't done it quite the way they want us to do it. They probably want us to institute primary proceedings. That was one of the reasons why I wanted to wait until Bill Lepper instituted a proceeding in this court to get the $64,000. In that way, by merely attacking his claim and setting up the affirmative defenses, we had the matter at issue before this Court on a [285] summary proceeding.

I will state to the Court also that I plan to file a written answer to this demand, so that the record will be clear on the point. And with reference to the pending proceedings now, I have one witness

to examine, Mr. John Gray, which will take only about five minutes. I want to find out what he knows about this situation.

Mr. Seymour: The hearing on the Lepper matter was continued to November 1st, at which time various witnesses were requested to return again unless they were notified to the contrary.

Mr. Blonder: I intend to do that.

Mr. Seymour: Mr. Gage and I would like to examine Messrs. Smith and Scherer at a 21-A examination, and I think it would be better that the Trustee would merely not notify them not to return on November 1st, and give us an opportunity to examine them.

Mr. Blonder: They were subpoenaed as witnesses.

The Referee: Have they been examined?

Mr. Blonder: They have not been examined, because we were just getting to that. I will be glad to examine them, if these creditors want that done, and I will call them and tell them that they have to be here then.

Mr. Seymour: Mr. Falkenberg, of Consolidated Casting, is another witness.

Mr. Byrne: The reason we offered the compromise was [286] because we—

The Referee: You need not go into that. If the creditors think the witnesses should be examined, and if you have no objection, go ahead.

Mr. Blonder: I have no objection. I know that, as far as Mr. Scherer and Mr. Smith are concerned, they will definitely testify as to the impropriety and

the fraudulent acts which occurred at the chattel mortgage foreclosure sale. Mr. Gage, I understand, has a letter from them to that effect. And so we are going to use them as witnesses in that particular hearing, and they are still under subpoena. I have no objection to examining them.

Mr. Byrne: On the offer of compromise, one of the prime motives of my offering this compromise, one of my prime purposes, was to stop the personalities. That is the reason I made the offer.

The Referee: Well, they can certainly examine these witnesses.

Mr. Byrne: But the matter has been compromised; they either accept my compromise, or they do not.

Mr. Blonder: May we ask Mr. Seymour and Mr. Gage what they think the Trustee may accomplish by examining these three witnesses? I disclosed what I know those witnesses will testify to. I disclosed what I will examine them about. I disclosed what I think they know and what they will testify to. I think it would be most appropriate for Mr. Seymour and [287] Mr. Gage to advise the Trustee, since he wants us to examine them, to tell us what they want to find out from these three individuals. I think it would be interesting to know that fact.

Mr. Seymour: You stated that it was your opinion that their testimony would be that the sale on the chattel mortgage was, in essence, fraudulent.

Mr. Blonder: Right.

Mr. Seymour: That is the purpose of my examination. If you will stipulate that that is what their

testimony would be, I will dispense with the examination.

Mr. Blonder: Mr. Seymour, or Mr. Gage, has letters in his possession—I want the record to show that Mr. Gage has letters in his possession, by Scherer and Smith, which state what they will testify to. He never showed them to me when I had him on 21-A proceedings several weeks ago, and he didn't tell me anything about it. If you want to know what they are going to testify to, let's see what they say. They have got it in writing, your Honor.

Mr. Seymour: I want to have their testimony as a part of the record.

The Referee: That is denied. I am not trying any issue raised on these charges. I am simply holding that this is a substantial offer, and I am going to approve it, unless you want to take over the litigation and guarantee that the estate will get that amount. [288]

Mr. Gage: Is it my understanding, your Honor, from what you said, that you are not concerned with whether there was fraud there or not?

The Referee: It isn't a question of my concern. It is a question of whether you want to take over the litigation or whether you don't.

Mr. Gage: That is your order?

The Referee: That is my order. That is not denying you any right whatever, provided you guarantee that the estate will get this money.

Mr. Blonder: May I proceed with the examination of Mr. Gray, your Honor?

The Referee: All right.

Mr. Blonder: May I ask you, for the record, Mr. Seymour, do you know anything about Superior Casting Company of Texas which would enable the Trustee to get together any assets or funds for the benefit of the present bankrupt estate?

Mr. Seymour: I know nothing more than what Mr. Gage testified to. What I do know I learned from him.

Mr. Blonder: All right. I am satisfied, for the record. Now, Mr. Gray.

(Examination of the witness John D. Gray omitted.)

Mr. Seymour: Do I understand, your Honor, that these witnesses Scherer and Smith will be examined, the witnesses I mentioned before, Scherer and Smith, that we will have an [289] opportunity to examine them on the first?

The Referee: If you can uncover any assets, yes. Otherwise it is a waste of time. But I am not going into the merits of the thing.

Mr. Seymour: We are desirous of knowing their testimony and having it in the record. We do have an affidavit as to what they would say, and would like to have it in the record—that is Scherer and Smith and Falkenberg.

Mr. Chichester: That is in connection with the compromise?

The Referee: I am not concerned—

Mr. Seymour: But we are—

The Referee: Sit down. I am not concerned with

all these charges. Unless you can take over the litigation and guarantee that money to the estate, it would shock the conscience of any equity judge to do otherwise.

Mr. Seymour: For the record, I request that we be permitted to examine Mr. Walter Smith, one Les Scherer—I don't know Falkenberg's first name.

Mr. Blonder: William.

Mr. Seymour: And William Falkenberg, for the purpose of demonstrating by their evidence that the sale under the chattel mortgage was fraudulent.

The Referee: Maybe it is. I don't know.

Mr. Seymour: Well, but I want to get that in the record, and I request an opportunity to examine them for the [290] purpose of putting their evidence on the record.

Mr. Blonder: I have no objection, but it may hold up—I don't want that to hold up the compromise.

Mr. Chichester: I am afraid the compromise might be [291] lost. I have a $20,000 certified check in my possession, that I want to deposit to the account of the bankrupt estate. One of the reasons for making that offer in compromise was to terminate further litigation and further examination of witnesses, and a possible strain on friendship between individuals in this matter. That is one of the reasons why we have a substantial offer. If that offer is going to be jeopardized by trying to keep open these apparent wounds and bringing the whole matter back to the surface again, we can very well lose the compromise.

The Referee: I agree with that.

Mr. Blonder: May I suggest that we go ahead with the compromise, and your Honor rule, and if, at any later date, we have to examine these witnesses, they are still open for 21-A examination.

Mr. Gage: I take it, then, that this Court, for purposes of this compromise, is not interested as to whether there was any fraud in the sale or not?

The Referee: I am going to give you a chance to go into it in the proper way, if you want to.

Mr. Gage: Just by bringing it up under 21-A, your Honor?

Mr. Seymour: Just by putting up $21,000, your Honor?

The Referee: Well, I can't help that. I am not going to let you use the process of this court and ball this thing up so that we will get nothing in the end. [292]

Mr. Gage: Has the Court any objection to Mr. Seymour and myself examining those two witnesses under 21-A tomorrow, before the date set for the compromise to be heard, November 1st?

Mr. Blonder: That November 1st date is just a continuation of the litigation itself.

The Referee: If it is anything that would jeopardize the compromise, we won't do it.

Mr. Chichester: I think that is right, your Honor.

Mr. Seymour: In other words, we may not do that, we may not examine any of these witnesses?

The Referee: That's right, upon the ground, solely, that this compromise is intended to eliminate all that.

The offer is very substantial. And if you think you can do better by an assumption of the litigation, you can have the opportunity to take it over. You have refused to do so.

Mr. Seymour: I refused on one ground only, that I didn't have $21,000.

The Referee: We can't jeopardize the creditors by doing it. [293]

Certificate

I, C. W. McClain, hereby certify that on the 30th day of October, 1951, I attended and reported, as official court reporter, the proceedings in the above-entitled and numbered matter before the Honorable Reuben G. Hunt, Referee in Bankruptcy, in said Matter, and that the foregoing is a true and correct transcript of the proceedings had therein on said date and that said transcript is a true and correct transcription of my stenographic notes thereof.

Dated at Los Angeles, California, this the 13th day of November, 1951.

/s/ C. W. McCLAIN,
Official Court Reporter.

[Endorsed]: Filed November 13, 1951, [294] Referee.

No. 13443

In The

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, *Appellant*,

vs.

ALMA RAISH, *Appellee*.

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

APPELLANT'S BRIEF

KOERNER, YOUNG, McCOLLOCH & DEZENDORF
JOHN GORDON GEARIN
OGLESBY H. YOUNG
800 Pacific Building
Portland 4, Oregon
Attorneys for Appellant

VERGEER & SAMUELS
DUANE VERGEER
HARRY F. SAMUELS
Portland Trust Building
Portland 4, Oregon
Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES

OTHER AUTHORITIES

No. 13443

In the

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, *Appellant*,

vs.

ALMA RAISH, *Appellee*.

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

APPELLANT'S BRIEF

JURISDICTION

This is an appeal from a judgment in a civil action. This action was commenced in the Circuit Court of the State of Oregon for Multnomah County by Alma Raish, appellee herein, who was at the time of the commencement of the action an Oregon resident. Appellant Southern Pacific Company was and is a Delaware corporation. The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00. The action was removed to the United States District Court for the Dis-

trict of Oregon upon appellant's petition. The District Court had jurisdiction under 28 U.S.C.A. Sec. 1332 (a) and 28 U.S.C.A. Sec. 1441 (b).

SUMMARY OF FACTS AND CONTENTIONS

Appellee was injured when a Fraser automobile in which she was riding as a passenger was struck by a Los Angeles-Seattle Motor Express truck and trailer being driven by Thomas Embleton in a southerly direction on U. S. Highway No. 99, just south of Eugene, Oregon. The Fraser automobile was stopped off the paved portion of the highway on the westerly side thereof, some distance south of a railroad overpass maintained by appellant over the highway.

There was evidence that the truck collided with a portion of the overpass and moved about 70 feet before colliding with the Fraser automobile. The truck and trailer and the automobile then moved some distance further and appellee was thereafter injured.

After the accident, the insurance carrier for the truck paid to appellee the sum of $27,000.00, obtaining from her a document entitled "A Covenant Not to Execute" (Exhibit No. 38). Appellant contends that this document was in reality a release of all joint tort feasors, since it was an unconditional release of one

joint tort feasor without reserving appellee's rights against the other.

Having admitted testimony as to appellee's intent in signing the document entitled "A Covenant Not to Execute," it was error for the court not to give a requested instruction on appellant's theory of the import of the document (appellant's requested instruction XVII).

Appellee contends that appellant railroad was negligent in maintaining a railroad overpass of insufficient width and height for vehicular traffic and that such negligence was a proximate cause of her injury. Appellant contends that there was no proof of negligence against it. It thus becomes necessary to set forth the exact physical nature of this area in some detail. U. S. Highway No. 99 turns at an approximate 90° angle about 800 feet north of the railroad overpass. The paved portion of this two-lane highway is 17 feet in width where the highway passes under the overpass. The overpass crosses the highway at an approximate right angle, and the vertical clearance under the overpass is about 12 feet 11 inches. The actual space between the sides of the overpass is 24 feet, but because the overpass and highway do not intersect at exact right angles, the true horizontal clearance is 21 feet 7½ inches. At the top corners of the overpass are triangular shaped metal "knee

braces" which somewhat diminish the vertical clearance over the gravel shoulders. (See Exhibit No. 3.) Significantly, neither the horizontal nor vertical clearance above the paved part of the highway is materially reduced because of the presence of the knee braces.

The evidence showed that the truck was 12 feet 3 inchs in height and 8 feet in width. The paved lane of the highway for vehicles travelling south was 8 feet 8 inches wide. According to Embleton's testimony (Tr. 73):

> "Well, just as I was entering the underpass, I noticed this red truck that had already started to enter the underpass going the other way. As I started through, I noticed he was quite aways over in my lane, and I said to myself, he is not giving me much room. So I swerved over to my right to avoid a collision and just about that time there was a crunch."

And (Tr. 92):

> "Q. To get back to the red truck, if the red truck hadn't crowded you over there, there wouldn't have been an accident, would there?
>
> "A. Well, hardly."

As shown by paragraph III of the stipulated statement of facts of the pre-trial order (Tr. 4):

> "Immediately prior thereto (the collision) the truck and trailer of Los Angeles-Seattle Motor Ex-

press, Inc., collided with a portion of said railroad overpass when its driver Thomas Ivisin Embleton swerved to his right to avoid colliding with a northbound truck which was entering the underpass and which was being driven partially over the center line of said highway." (Interpolation ours.)

At the time the Los Angeles-Seattle Motor Express truck came into contact with the overpass, it was moving at a speed of approximately 30 miles per hour. The truck then proceeded for a distance of 215 feet, and in its course collided with appellee's automobile and three other passenger automobiles, crushing them all against a telephone pole, which ultimately stopped the procession.

Appellant contends that there was ample clearance for the Los Angeles-Seattle Motor Express truck to pass through the underpass. According to Embleton's testimony, it was forced off the highway by the red truck. Therefore, appellee's charges that the overhead crossing was maintained at a height and width insufficient for the safe passage of persons making ordinary use of the highway is unsupported by the evidence. Even assuming that there was some satisfactory evidence of negligence on the part of appellant, such negligence was not the proximate cause of this accident.

Appellant further contends that the negligence of

the driver of the Los Angeles-Seattle Motor Express truck or the negligence of the driver of the red truck, or the concurrent negligence of each truck driver, constituted the sole, proximate cause of this accident.

The contentions here stated are presented on this appeal in several forms, viz., objections to the matters submitted by the trial court to the jury, objections to the giving of certain instructions, the failure to give certain requested instructions, and the failure of the trial court to grant appellant's motion for a directed verdict or its motion for judgment notwithstanding verdict, or in the alternative for a new trial.

SPECIFICATIONS OF ERROR

SPECIFICATION OF ERROR I

The Court erred in construing the covenant not to execute (Exhibit 38) as a covenant not to sue and not as a release. Objections were made to this construction of the document (Tr. 113):

> "THE COURT: I am going to call this document Covenant not to Execute, as it does in the Pre-trial Order, a Covenant Not to Sue, but if you think you want further testimony from Mrs. Raish on this point, you may wish to make an offer of proof.
>
> "MR. VERGEERS: I think we will stand on the document itself.

"MR. GEARIN: We will object since the Court has construed this document as a Covenant not to sue, and since we have by Pre-trial Order made it one of our positions that it must be construed as a release, and we would object to the Court construing it in any other way, other than instructing the Jury that it was not a Covenant not to sue, but it should be instructed that it is a release."

SPECIFICATION OF ERROR II

The Court erred in failing to give any of the instructions hereinafter set forth which were requested by appellant. Objections were taken to such failure (Tr. 138-141).

A.

The trial court erred in failing to give the following instruction requested by appellant:

"A. Plaintiff must sustain the burden of proof against defendant by satisfactory evidence.

"B. Evidence is satisfactory only if it produces moral certainty or conviction in an unprejudiced mind.

"C. Only evidence which produces such moral certainty or conviction is sufficient to justify your verdict. Any evidence less than this is insufficient."

B.

The trial court erred in failing to give the following instruction requested by appellant:

"A. Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a height insufficient for the safe passage of persons making ordinary use of the public highway.

"B. I instruct you that there is no evidence to support this charge.

"C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case."

C.

The Court erred in failing to give the following instruction requested by appellant:

"A. Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a width insufficient for the safe passage of persons making ordinary use of a public highway.

"B. I instruct you that there is no evidence to support this charge.

"C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case."

D.

The trial court erred in failing to give the following instruction requested by appellant:

"C. In connection with the charge that the truck of Los Angeles-Seattle Motor Express was being operated without adequate or efficient brakes thereon, I instruct you that there was applicable at the time and place of the accident the following statute of the State of Oregon. (To the Court: see 8 O.C.L.A. Sec. 115-376 (e)):

" '(e) The brakes of a motor vehicle or combination of vehicles shall be deemed adequate when, on a dry, hard, approximately level stretch of highway, free from loose material, such brakes shall be capable of stopping the motor vehicle or combination of vehicles, when operating at speeds set forth in the following table, within the distances set opposite such speeds. * * *

Miles per Hour	Stopping Distance
10	9.3 feet
15	20.8 feet
20	37.0 feet
25	58.0 feet
30	83.3 feet'

"D. Violation of the foregoing statutes is negligence as a matter of law.

"E. You are instructed that the violation of or failure to obey the requirements of a law which for safety or protection of others commands or requires certain acts or conduct or forbids or prohibits certain acts or conduct is negligence per se, or in other words negligence in and of itself, regardless of what an

ordinarily careful and prudent person might do i
the absence of such law."

E.

The trial court erred in failing to give the followin
instruction given by appellant:

"If you should believe from the satisfactory evi
dence that at the time plaintiff executed the agree
ment entitled '[Covenant] Not to Execute' on Jul
26, 1951, plaintiff did not expressly reserve the righ
to sue Southern Pacific Company, then in that even
I instruct you that the plaintiff can not recover an
your verdict must be against plaintiff and in favo
of defendant."

SPECIFICATION OF ERROR III

The court erred in giving the following instruction

"Vehicular traffic is entitled to use the entir
roadway including the shoulders and, in determin
ing whether defendant maintained its overhea
crossing with sufficient clearance, you are to con
sider whether an obstruction was being maintaine
over them, or any part of the roadway including th
shoulders."

SPECIFICATION OF ERROR IV

The trial court erred in withdrawing from the jury'
consideration the charge that the driver of Los Angeles

Seattle Motor Express' equipment was guilty of negligence in operating the same without an adequate or proper steering mechanism thereon.

SPECIFICATION OF ERROR V

The court erred in ruling adversely upon appellant's motion for a directed verdict, for judgment non obstante veredicto and for a new trial.

SUMMARY OF ARGUMENT

The appellant's contentions are as follows:

1. The trial court erred in construing the covenant signed by appellee as a covenant not to sue and not as a release, because there was no reservation of right to sue any other tort feasor.

2. The trial court erred in failing to give certain instructions requested by appellant defining burden of proof and showing lack of proof to substantiate the charges of negligence, in failing to give the jury a requested statutory instruction showing the standard by which the jury was to measure the efficiency of the brakes of the truck involved in the accident, and in failing to submit to the jury appellant's theory of the effect of the execution of the subject covenant.

3. The jury was misled to the prejudice of appellan by an instruction that motorists have an absolute righ to use the shoulders of a highway regardless of an ob struction thereon, it being the appellant's position tha a motorist's right to use the shoulders of a highway is a qualified right.

4. The charge of negligence that the Los Angeles Seattle truck driver was operating the truck without ar adequate steering mechanism was erroneously with drawn from the jury's consideration by the trial court since there was substantial testimony to support the charge.

5. There was no evidence to warrant the submissior of the case to the jury. There was no evidence that any act or omission on the part of appellant was a proximate cause of the accident. The evidence conclusively showed that the sole proximate cause of the accident was the negligence of the driver of an unidentified truck or the negligence of the Los Angeles-Seattle truck driver or the combined negligence of the two truck drivers. There fore, the trial court erred in denying appellant's motion for a directed verdict, judgment non obstante veredicto, or in the alternative for a new trial.

SPECIFICATION OF ERROR I

The court erred in construing the Covenant Not to Execute (Exhibit 38) as a covenant not to sue and not as a release. Objections were made to this construction of the document (Tr. 113):

> "THE COURT: I am going to call this document, Covenant not to Execute, as it does in the Pre-trial Order, a Covenant Not to Sue, but if you think you want further testimony from Mrs. Raish on this point, you may wish to make an offer of proof.
>
> "MR. VERGEERS (sic): I think we will stand on the document, itself.
>
> "MR. GEARIN: We will object since the Court has construed this document as a Covenant not to sue, and since we have by Pre-trial Order made it one of our positions that it must be construed as a release, and we would object to the Court construing it in any other way, other than instructing the Jury that it was not a Covenant not to sue, but it should be instructed that it is a release."

ARGUMENT

By the Pre-trial Order appellant contended that the execution of the document entitled "A Covenant not to Execute" was a release of Los Angeles-Seattle Motor Express, and as a matter of law therefore a release of appellant. Oregon subscribes to the general substantive rule that the release of one joint or concurrent tort

feasor releases all. *Stires v. Sherwood*, 75 Ore. 108, 145 Pac. 645.

Pacific States Lumber Company v. Bargar, 10 F (2d) 335, (9th Cir. 1926) is a case arising under the Oregon Employers Liability Act where this court had occasion to discuss the indicia of a covenant not to sue. It was there stated, page 337:

> " 'Indicia of a covenant not to sue may be said to be: No intention on the part of the injured person to give a discharge of the cause of action, or any part thereof, but merely to treat in respect of not suing thereon (and this seems to be the prime differentiating attribute); full compensation for his injuries not received, but only partial satisfaction; *and* a reservation of the right to sue the other wrongdoer'." (emphasis added)

The document in question meets few of the tests prescribed by the *Bargar* case. Appellee to this date has the right to sue Los Angeles-Seattle Motor Express and/or its agents for any injuries she received in the accident. The agreement does not contemplate a cessation of litigation. By its execution appellee only relinquishes her right to collect any part of a judgment. There was no reservation of the right to sue any other wrongdoer.

Apart from the question that such a collusive agreement is a fraud upon the court because it did in effect

render nugatory appellant's privilege of making Los Angeles-Seattle Motor Express a third party defendant, we submit as a matter of law this agreement is not a covenant not to sue, but is in effect a release.

SPECIFICATION OF ERROR II

The court erred in failing to give any of the instructions hereinafter set forth which were requested by appellant. Objections were taken to such failure (Tr. 138-141).

A.

The trial court erred in failing to give the following instruction requested by appellant:

> "A. Plaintiff must sustain the burden of proof against defendant by satisfactory evidence.
>
> "B. Evidence is satisfactory only if it produces moral certainty or conviction in an unprejudiced mind.
>
> "C. Only evidence which produces such moral certainty or conviction is sufficient to justify your verdict. Any evidence less than this is insufficient."

ARGUMENT

This instruction is a correct pronouncement of the Oregon law as shown by Section 2-111, O.C.L.A., which provides:

"That evidence is deemed satisfactory which or dinarily produces moral certainty or conviction i an unprejudiced mind. Such evidence alone wi justify a verdict. Evidence less than this is denom inated insufficient evidence."

The Oregon court has repeatedly approved such a instruction and has held that a defendant is entitled t have the instruction given upon request. *Metropolita Casualty Ins. Co. of N. Y. v. Lesher, Inc. et al,* 152 Ore 161, 52 P. (2d) 1133; *Gwin v. Crawford,* 164 Ore. 21 100 P. (2d) 1012.

In *Willoughby v. Driscoll,* 168 Ore. 187, 120 P. (2d 768, 121 P. (2d) 917, the court held that a similar in struction should have been given upon defendant' request.

B.

The trial court erred in failing to give the followin instruction requested by appellant:

"A. Plaintiff has charged that defendant wa guilty of negligence in that it constructed and main tained its overhead crossing at a height insufficien for the safe passage of persons making ordinary us of the public highway.

"B. I instruct you that there is no evidence t support this charge.

"C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case."

ARGUMENT

In bringing this action appellee relied principally upon *Krause v. Southern Pacific Co. et al*, 135 Ore. 310, 295 Pac. 966, where the plaintiff was injured while standing in the bed of a freight truck and facing the rear of the truck. As the truck passed under a railroad trestle plaintiff's head struck one of the steel girders supporting the trestle causing a fracture of plaintiff's skull. At the time of the accident the truck was proceeding upon the paved portion of the highway. The evidence showed that other trucks of like character had met with difficulty in passing under this trestle on account of insufficient vertical clearance. The Oregon Supreme Court in reversing the order of nonsuit granted by the trial court stated:

"It was the duty of the railroad company to so construct its trestle as to afford clearance for ordinary vehicular traffic."

In the instant case there was no satisfactory evidence that the overpass across the highway was a place of danger or that appellant had notice of the existence of

any dangerous condition. The operator of the Los An geles-Seattle truck testified as follows: (Tr. 90, 91)

"A. This type of equipment was new, fairly new the company was changing from what it did have the regular conventional trucks. They were buyin up these new ones.

"Q. This particular type built truck was called cab-over?

"A. Yes.

"Q. You had driven this rig about 5 times?

"A. Correct.

"Q. You had never had any difficulty before?

"A. No, never before.

"Q. You have driven this route up and down th coast for a good many years, haven't you?

"A. Yes.

"Q. You have driven higher rigs under this un derpass, haven't you?

"A. Yes.

"Q. How did you manage with them?

"A. Well, you have to slow down and go very slowly to get through with a higher rig. You have t go very slowly.

"Q. All the trucks that are the same genera height as the one you were driving—you had beer able to go through with them under the underpas with the same speed before, hadn't you?

"A. I had."

The truck was about 12′ 3″ in height. It is undisputed that the clearance above the entire paved portion of the highway was at least 7 inches or 8 inches above the height of the truck.

C.

The court erred in failing to give the following instruction requested by appellant: (Tr. 29)

> "A. Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a width insufficient for the safe passage of persons making ordinary use of a public highway.
>
> "B. I instruct you that there is no evidence to support this charge.
>
> "C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case."

ARGUMENT

The civil engineer called by appellee testified that the paved portion of the highway under the overpass was 17 feet in width, the easterly lane being 8′ 4″ wide and the westerly lane being 8′ 8″ wide (Tr. 36). The Los Angeles-Seattle truck which was 8 feet wide was travelling in the paved lane which was 8′ 8″ wide.

Mr. Embleton stated in response to certain question (Tr. 92):

"Q. Now, I think you have stated it before, Mr Embleton, that there is ample room in the under pass if both vehicles will keep on their own side o the center of the underpass, isn't that right?

"A. I said there is room to go in there, yes.

"Q. There is room to get by?

"A. Yes.

"Q. You have passed trucks under the underpas before, haven't you?

"A. Yes.

"Q. To get back to the red truck, if the red truck hadn't crowded you over there, there wouldn't have been an accident, would there?

"A. Well, hardly."

The testimony of all plaintiff's witnesses who testified upon the subject showed there was sufficient horizontal clearance under this overpass for two trucks each being 8 feet wide to pass in safety *if both trucks had remained on their own side of the highway.*

D.

The trial court erred in failing to give the following instruction requested by appellant (Tr. 30):

"C. In connection with the charge that the truck of Los Angeles-Seattle Motor Express was being operated without adequate or efficient brakes thereon, I instruct you that there was applicable at the time and place of the accident the following statute of the State of Oregon. (To the Court: see 8 O.C.L.A. Sec. 115-376 (e)):

" '(e) The brakes of a motor vehicle or combination of vehicles shall be deemed adequate when, on a dry, hard, approximately level stretch of highway, free from loose material, such brakes shall be capable of stopping the motor vehicle or combination of vehicles, when operating at speeds set forth in the following table, within the distances set opposite such speeds. * * *

Miles per Hour	Stopping Distance
10	9.3 feet
15	20.8 feet
20	37.0 feet
25	58.0 feet
30	83.3 feet'

"D. Violation of the foregoing statutes is negligence as a matter of law.

"E. You are instructed that the violation of or failure to obey the requirements of a law which for safety or protection of others commands or requires certain acts or conduct or forbids or prohibits certain acts or conduct is negligence per se, or in other words negligence in and of itself, regardless of what an ordinarily careful and prudent person might do in the absence of such law."

ARGUMENT

By the pretrial order appellant charged the driver of the Los Angeles-Seattle truck with negligence in operating the equipment without adequate or efficient brakes thereon and further charged that such negligence was the sole proximate cause of the collision. The testimony shows that although the truck was traveling at a speed of approximately 30 miles per hour it did not stop until it had traveled for a distance of approximately 215 feet beyond the overpass, pushing four passenger automobiles in front of it during its course of travel, the forward motion of the procession finally being stopped by a collision with a power pole.

By Section 115-375, O.C.L.A., it is required that any combination of motor vehicles shall be equipped with brakes sufficient to stop such vehicle on a dry, hard, approximately level strip of highway at a distance of 83.3 feet when traveling at 30 miles per hour. There was ample evidence that at the time of this accident the brakes of the truck did not comply with the mandate of the above statute. The physical facts of the accident patently display the inefficiency of the brakes.

Mr. Embleton testified that his brakes did not function properly after the alleged contact between the upper right corner of the truck and the knee brace of

the overpass. It would be imposing upon the credulity of this court to contend that the impact between the top corner of the truck's body and the knee brace affected the truck's braking system. Neither appellee nor the operator of the truck testified as to this.

Mr. Embleton stated (Tr. 89):

"Q. Mr. Embleton, after you had struck the underpass, you then put on your brake?

"A. I did.

"Q. After that time, or at any time thereafter, did your truck slow down or respond to your brakes?

"A. Well, I was wondering why I wasn't slowing down faster than I did, yes.

"Q. Your brake drums had water on them as you went under the underpass?

"A. I don't know, but I didn't see, like I said, why I didn't slow down. As I said at the previous hearing, there is always a possibility.

"Q. Referring to your testimony on page 36, the first question on that page:

" 'Q. Is it your testimony that your brake drums had water in them as you went under the overpass?

" 'A. They did.'

"Q. Is that what your testimony is now?

"A. They did, they would have to have some water in them."

It was the duty of the court to submit to the jury som standard by which they could measure the efficiency o the truck's brakes, particularly so when that standar is fixed by statute. Since the adequacy of the brakes wa an issue in the trial of this cause, the failure to instruc as to the state law defining what are deemed to be ade quate brakes was prejudicial error.

E.

The trial court erred in failing to give the followin instruction given by appellant (Tr. 31):

> "If you should believe from the satisfactory evi dence that at the time plaintiff executed the agree ment entitled '[Covenant] Not to Execute' on Jul 26, 1951, plaintiff did not expressly reserve the righ to sue Southern Pacific Company, then in that even I instruct you that plaintiff can not recover and you verdict must be against plaintiff and in favor o defendant."

ARGUMENT

As appears from pretrial Exhibit 38 there is n reservation of right to sue Southern Pacific Company contained in the covenant. The court construed the cov enant as a covenant not to sue. Since one of the essential of a covenant not to sue is a reservation of rights agains other tort feasors (supra) the covenant would becom

a release if there were no such reservation. Over appellant's objection appellee testified as to her intent in signing the covenant (Tr. 119).

Appellant contended by the pretrial order that the covenant was in effect a release. The question of reservation of rights was made an issue by the pretrial order and appellee's testimony. Appellant was entitled to have its position and the legal consequences thereof presented to the jury by the court's delivery of the above instruction.

SPECIFICATION OF ERROR III

The court erred in giving the following instruction (Tr. 126):

> "Vehicular traffic is entitled to use the entire roadway including the shoulders and, in determining whether defendant maintained its overhead crossing with sufficient clearance, you are to consider whether an obstruction was being maintained over them, or any part of the roadway including the shoulders."

ARGUMENT

The above instruction is misleading as it defines a motorist's right to drive upon the shoulders of the roadway as absolute, when in reality it is a qualified

right. The Oregon law on this point is shown by th recent case of *Prauss, Admx. v. Adamski*, 54 Ore. Adv Sh. 803, 244 P. (2d) 598, where it was stated:

> "However, it must be borne in mind that a drive of a motor vehicle has a lawful right to drive on th gravel shoulder of the highway on his own right hand side whenever such gravel shoulder is suitabl for travel. In other words, the mere fact that on drives the whole or any part of his automobile on th gravel shoulder does not constitute negligence i and of itself, nor is such driver guilty of negligenc in leaving the paved portion of the highway to driv on such shoulder, if it may be done in reasonabl safety. But there might be conditions under which i would be negligence for the driver to leave the pave portion of the highway with any part of his vehicle Each case necessarily depends upon its own facts an circumstances."

All parts of the overpass maintained over the shoul ders of the highway were visible to a motorist usin reasonable care. The truck driver was no more entitle to drive against the knee braces of the overpass than h was to drive against any other barrier or sign main tained along the shoulder of the highway.

SPECIFICATION OF ERROR IV

The trial court erred in withdrawing from the jury' consideration the charge that the driver of Los Angeles

Seattle Motor Express' equipment was guilty of negligence in operating the same without an adequate or proper steering mechanism.

ARGUMENT

The driver of the Los Angeles-Seattle truck was charged by the pretrial order with negligence constituting the sole, proximate cause of the accident in operating the truck without an adequate or proper steering mechanism. The trial court in instructing the jury withdrew this specification of negligence from its consideration, although there was substantial evidence to support the charge.

The testimony of the truck driver showed that after the alleged impact between the upper right corner of the truck and the overpass there was difficulty in steering the truck. The impact caused the truck to swerve to the driver's left and the driver then turned to his right, but he was unable to turn again to his left because his steering mechanism was impaired (Tr. 82, 83):

> "Q. You say the impact of your truck and the underpass lurched you to the left toward the center lane? Did you lurch toward the center line?
>
> "A. It did.
>
> "Q. You didn't cross the center line?
>
> "A. I was too busy, I didn't notice, but I didn't go very far over there.

"Q. You were able to turn the truck all right?

"A. Yes, I did.

"Q. Will you tell the Jury why you couldn't turn to the left again when you knew you were going to hit Mrs. Raish's car?

"A. As far as I know, I would say my steering mechanism was impaired."

And at pages 93 et seq. of the transcript:

"Q. You had some trouble with the steering of your truck, as I understand it?

"A. Well, after the impact, yes.

"Q. The only part of your truck that came into contact with the underpass was the upper right corner wasn't it?

"A. Yes.

"Q. Could your steering difficulty be caused by the wet pavement or gravel on the road, rather than something wrong with the steering mechanism?

"A. No.

★ ★ ★

"Q. Can you give us any explanation now of why your truck would not respond when you tried to turn it to the left?

"A. No, I can't." (Tr. 94)

★ ★ ★

Certainly if the Los Angeles-Seattle equipment had been driven back onto the pavement from the westerly

shoulder of the highway, there would have been no collision between the truck and the automobile in which plaintiff was riding. A party is entitled to have its formal specifications of negligence contained in the pretrial order submitted to the jury when there is substantial evidence to support the charge.

SPECIFICATION OF ERROR V

The court erred in ruling adversely upon appellant's motion for a directed verdict, for judgment non obstante veredicto and for a new trial.

ARGUMENT

The specific grounds urged in support of appellant's motions for a directed verdict, judgment non obstante veredicto or in the alternative a new trial appear in the transcript of record at pages 16, 17.

Since the error alleged in these motions is substantially the same they will be discussed together.

ABSENCE OF NEGLIGENCE ON PART OF APPELLANT

The only specifications of negligence remaining in the pretrial order at the conclusion of appellee's case in chief were the charges of maintaining the overpass

at an insufficient height and width for the safe passage of persons making ordinary use of the highway. The first ground of appellant's motion was that there was no evidence of negligence on the part of appellant as charged by appellee. The facts showing that there was no proof of insufficient height or width have already been discussed under Specification of Error II, (B) and (C) supra. Moreover, the uncontradicted evidence in this case establishes that at the time of this accident the persons using the highway under the overpass were not making an *ordinary* use of the highway.

"Ordinary" is defined by Black's Law Dictionary (3rd Ed. 1933) as:

> "Regular; usual; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances; belonging to, exercised by, or characteristic of, the normal or average individual."

The "ordinary use of the highway" in this instance would not mean the driving astraddle of the center line or over in the wrong lane of traffic, but traveling along the highway in the customary manner that trucks are driven upon this portion of the highway, the driver thereof being mindful of its condition.

Traffic on Oregon highways is regulated by Sections 115-301 to 115-383, O.C.L.A. By Section 115-327 O.C.L.A., subdivision (c) it is required:

> "In approaching any bridge, viaduct or tunnel, or approaching or crossing a railroad right of way or an intersection of highways, the driver of a vehicle shall at all times cause such vehicle to travel on the right half of the highway unless such right half is out of repair and for such reason impassable. This provision shall not apply upon a one-way street."

Subdivision (b) of Section 115-328, O. C. L. A. requires:

> "A vehicle shall be driven as nearly as is practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

The trial court recognized that the railroad had a right to rely upon the presumption that motorists would exercise ordinary care in driving under its overpass. The jury was instructed (Tr. 126, 127):

> "The defendant * * * had a right to assume that all persons driving vehicles upon the highway would obey the law and would not drive in a careless and negligent manner."

Since the railroad was entitled to assume that the law would be obeyed and the uncontradicted evidence in this case showed there was a violation of the traffic law which proximately caused this accident, and had the law been obeyed there would have been no accident, it is submitted that there was no evidence that defendant was guilty of negligence.

This court should take judicial notice of the fact that U. S. Highway 99 is the principal arterial highway linking the states of Washington, Oregon and California, and as such is a very heavily travelled highway. There is no evidence in the record that any accident had ever occurred at this overpass before, although the record shows that higher trucks had been driven under this same overpass. There is no evidence that the warnings given were not sufficient to advise reasonably prudent drivers of any possible danger and none to indicate that defendant should have known or anticipated that drivers would conduct themselves as the operators of the Los Angeles-Seattle truck and the red truck did.

Without question, if the testimony of Embleton and witness Barnhardt (Tr. 61) is to be believed, the driver of the red truck was negligent as a matter of law in driving astraddle of the center line under the overpass. And in addition to the direct evidence on the subject the negligence of the operator of the Los Angeles-Seattle truck

in one or more of the particulars charged by the pretrial order is proven by the fact that the insurance carrier for the trucking company paid to the appellee the sum of $27,000.00.

There is no proof that the construction of the overpass was unlawful and, there being no proof on this point, the presumption is that the construction thereof was lawful. Moreover, if the overpass presented an obstruction in the highway the traveling public was required to take notice of it. As stated in *Lorentz v. Public Service Ry. Co.*, 103 N. J. Law 104, 134 Atl. 818,820, where plaintiff, a guest passenger in an automobile was injured as the result of a night-time collision with an unlighted railroad pier in the center of the highway:

> "It seems therefore clear, and indeed is not denied, that this elevated structure is a lawful structure * * *. Structures of this kind, authorized by law and used to facilitate public travel, although they are physical obstructions to drivers of ordinary vehicles and perhaps to pedestrians, are nevertheless not nuisances, and the public must take notice of them."

★ ★ ★

> "We conclude that * * * a verdict should have been directed for defendant and it was error to refuse such direction."

In *Chicago R. I. & P. Ry. Co. v. James*, 192 Ark. 221, 91 S.W. (2d) 269, 271, where plaintiff had collided with the pier of a railroad trestle along the side of the road the court stated:

> "There was ample clearance with a wide margin for safe passage between the piers or bents. Plaintiff had only to notice where he was going, and what he was doing, and to exercise only ordinary care in driving, to pass under the railroad in safety, failure in which is negligence and was the cause of his injury."

PROXIMATE CAUSE

The second ground of appellant's motion for a directed verdict was that no act or omission of appellant constituted the proximate cause of this accident, it being appellant's position that the presence of the railroad overpass was a mere condition, as distinguished from cause, of the accident. The condition was apparent and known by all of the motorists involved in the accident.

In *Hansen v. The Bedell Co. et al*, 126 Ore. 155, 268 Pac. 1020, plaintiff, a pedestrian, had been struck by an automobile which had swerved to avoid a collision with a truck. The court found as a matter of law that the driver of the defendant truck was guilty of negligence in failing to yield the right of way to the other

automobile which swerved to avoid a collision and struck plaintiff. The court, in discussing proximate cause, quoted approvingly from *Hill, et al v. Jacquemart, et ux*, 55 Cal. App. 498 (203 Pac. 1021, 1022) as follows:

> "The proximate cause of an injury is the efficient cause; the one that necessarily starts the other causes in motion; the moving influence. (Authorities cited.) Here the proximate cause of the injury was the collision occasioned by the negligence of Mrs. Jacquemart running her automobile into that of Mrs. Hill. Without this collision the impact of the telephone pole happening immediately thereafter would not have occurred."

Foreseeable injury is a requisite of proximate cause and proximate cause is a requisite for actionable negligence. In order to show that an act of negligence is the proximate cause of an injury the consequence of the negligence should have been foreseen by the wrongdoer as likely to follow from its act or omission. *Aune v. Oregon Trunk Ry.*, 151 Ore. 622, 51 P. (2d) 663. If the injury complained of could not have been reasonably foreseen in the exercise of due care, the party whose conduct is under investigation is not answerable therefor.

As stated in Section 435, subdivision (2) of the Restatement of Torts (1948 Supp.):

> "The actor's conduct is not a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm."

The existence of the overpass did not prevent the safe passage of persons making ordinary use of the highway. Hence the appellant in the exercise of due care could not have foreseen or anticipated that a truck would proceed astraddle of the center line forcing another truck and trailer off the highway and into collision with a portion of the overpass, thence on some distance to a point where the truck and trailer "bumped" a passenger automobile stopped off the highway, causing the truck and trailer to go out of control and crush the first automobile and three other automobiles into a power pole. In the words of the Restatement it is submitted it is "highly extraordinary" that the maintenance of the overpass should have brought about such harm. This occurrence was beyond the realm of probability.

Beckley, et al v. Vezu, et al, 23 Cal. Ap. (2) 371, 73 P. (2) 296, was an action for personal injuries sustained by plaintiffs when an automobile in which they were riding as guests struck the railing of a bridge within the City of San Bernardino, California. The complaint

named the driver of the automobile, the City and the County as defendants. The evidence showed that about midnight, as the driver approached the bridge, with which he was familiar, the lights of two other cars approaching from the opposite direction temporarily blinded him, and after these other cars passed he collided with the bridge railing. The driver testified he did not slacken his speed nor swerve before the collision with the railing, although he estimated that he had within 75 to 100 feet within which to make such a movement.

Statutory negligence was charged against the City and County for constructing and maintaining a dangerous structure or condition on the highway. The jury returned its verdict in favor of plaintiffs and against the City and County only, thus exonerating the defendant driver. The County moved for an instructed verdict which was denied and the County then appealed from the denial of its later Motion for judgment notwithstanding verdict. The appellate court in reversing the trial court stated: (p. 299)

> "Although he (the driver) knew the condition which existed at the bridge, knew its location with respect to a point which he had just passed, and knew that it was in close proximity, he continued with unabated speed even when he says his vision was obstructed. * * *
>
> "After he actually saw the bridge and the bumper rail he had from 75 to 100 feet in which to

move over about the width of his car, with no other traffic approaching and nothing in his way. * * *

"* * *, the facts remain that the driver of this car continued at a high speed when he knew he was somewhere near the bridge, that he made no attempt to slow down when he did see it, and that he was then going so fast that he was unable to turn to his left about the width of his car, in a distance from 75 to 100 feet. In our opinion the evidence, taken most favorable to the respondents, discloses that the cause of this accident was the conduct of the driver of this car and the manner in which he drove the same. * * *

"* * * there is no evidence in the record to support a finding that the appellant had constructive notice that the existing condition was dangerous for such a driver. Rather unusal precautions had been taken to give warning of the condition, to guide traffic onto the bridge, and to protect the public. Whether or not it was possible to do more in this direction the precautions taken had proved sufficient for nearly a year and a half with heavy travel. There is no evidence that any other driver of an automobile ever had an accident because of this condition or that any claim had ever been made. There is no evidence that would tend to bring home to the appellant notice that the warnings given were not sufficient to advise reasonably careful drivers of any possible danger and none to indicate that it should have been known and anticipated that a driver would conduct himself as this one says he did. It follows that the court erred in denying appellant's motion for a judgment notwithstanding the verdict. * * *"

In *Daniels v. Cranberry Fuel Co.*, 111 W. Va. 484, 163 S. E. 24, plaintiff brought an action against the owners of an overhead mine track (a tipple) which passed over a paved highway at an angle, for injuries received in a collision between plaintiff's motorcycle and a Jewett automobile. The collision occurred under the overhead crossing. The jury returned a verdict in plaintiff's favor. Upon motion of defendant this verdict was set aside by the trial court and judgment was entered in favor of defendant, the trial court's action being affirmed on appeal.

The evidence established plaintiff was proceeding south along the highway in the daytime on his motorcycle, following a Chrysler car at a distance of about ten feet under the mine track overpass. The overpass was supported by timber piers on either side of the road. The highway under the overpass was about 18 feet wide, with the pavement being only 9 feet wide. The road curved in the direction the Jewett automobile was travelling so that Ricketts (the driver of the Jewett automobile), who was travelling in a southerly direction, had his view obstructed by the easterly pier. The Jewett automobile met the Chrysler car just as the Jewett car entered the highway beneath the overpass. The Jewett driver claimed that because of the narrowness of the road it was necessary for him to strike either the pillar

on his right or the motorcycle immediately behind the Chrysler. Ricketts stated he had not previously seen the motorcycle because the pier caused an obstruction to his view. Ricketts turned his car to his left and struck the motorcycle, injuring plaintiff.

The Supreme Court first denied that the maintenance of the overpass was a public nuisance, and then stated:

> "Nor can we see how the jury concluded that the maintenance of the pier was the proximate cause of the injury.
>
> ★ ★ ★
>
> "In what manner can the injury be attributed to the timbers? The declaration charges that they obstructed the view on either side of the trestle; but plaintiff's view of the road was obstructed by the Chrysler car, and Ricketts could not see plaintiff for the same reason. Moreover, it should be remembered that driving north (or in the direction in which Ricketts was driving) the road curved to the left. Both Ricketts and plaintiff were familiar with the road and had driven over it on numerous prior occasions; hence it was incumbent upon each to use such care as the situation demanded of the ordinary prudent person in approaching the tipple and going under it. Ricketts says that it became necessary for him to strike either the timbers or plaintiff. Why did the timbers become an impediment to his travel? The road was about eighteen feet in width, sufficient for two cars to pass easily, safely and conveniently. Had the jury believed plaintiff, it must have believed his testimony that he was within three feet of the

timbers on his right. The handlebars of his motorcycle measured two feet in width. In what way could the timbers on the opposite side of the road by themselves prevent the Jewett car—67½ inches in width —from passing? The trial judge, with this evidence before him, supplemented by his observation of the witnesses, came to the conclusion, in a memorandum made a part of the record, that the proximate cause of the injury was not the pier, but it was the negligence of Ricketts or the driver of the Chrysler car (who does not testify) or the combined negligence of Ricketts and plaintiff; and for these reasons set the verdict aside. * * *"

A case peculiarly in point is *Gable v. Kriege*, 221 Iowa 852, 267 N. W. 86, where two death actions were consolidated for trial. The actions were originally brought against three defendants, and later by amendment the Chicago, Milwaukee, St. Paul & Pacific Railroad Company was made a fourth party defendant. Settlements were effected between plaintiffs and all defendants, except the railroad, and covenants not to sue those defendants were obtained. There was a trial as to the railroad only and at the close of all the evidence the trial court granted the railroad's Motion for a directed verdict. The Iowa Supreme Court affirmed the trial court's action.

The record disclosed that the tracks of the railroad defendant crossed a highway at a very slight angle. The

accident occurred in the early afternoon. One of the original defendants, Rex Kent, at the time in question, was driving down the highway from the north approaching the crossing. He was driving a truck with a load of gravel on an incline approaching the railroad crossing. The testimony of the plaintiff's witness, Rex Kent, the driver of the truck, showed that when he approached the track of the defendant railroad he hit a hole or depression, and the resulting jolt or jar broke a spring and shackle on the truck and caused it to go out of control. The truck driver testified he was driving down the hill 20 miles an hour, but as he approached the crossing he decreased his speed to about 15 miles an hour. After the truck went out of control it took a wobbly and uncertain course across the tracks of the defendant railroad and then veered at an angle towards the left or east side of the highway and about 150 feet south of the crossing collided head on with a Chevrolet car driven by Allen Gable, who was accompanied by his wife, two minor children and a guest. The collision resulted in the death of Mr. Gable, the two minor children and the guest.

The claim of the plaintiffs is that the defendant railroad failed to provide and maintain a good and safe crossing at the place of the accident. The Iowa Supreme Court in affirming the action of the trial court held:

"* * * The condition of the highway as complained of by plaintiffs was not the proximate cause of the accident and resulting damage. The defective equipment of the truck, and its overloading and excessive speed, were without question the proximate cause of the accident involved in this case. The driver of the truck, as plaintiffs' witness, testified that there were no brakes thereon; that there was a load of six or seven tons of gravel, and that the overload was at least three or four tons; that he approached the crossing at 12 or 15 miles an hour with a truck thus equipped and thus overloaded. It is certain that the left front wheel of the truck could never have gotten into the hole or depression on the west or right hand side of the highway, and the evidence clearly shows that the left front spring and shackle were broken, not from the condition existing at the crossing, but wholly on account of the defective equipment of the truck, the partial broken left spring, the overload of gravel, and the speed at which the truck was being driven. And this must be held to be the primary, efficient, and proximate cause of the resulting accident."

For the purpose of argument, assuming in the instant case there was some negligence on the part of the appellant, the subsequent intervening negligence of the Los Angeles-Seattle truck driver was so great as to be a superseding cause of plaintiff's injury. After the alleged contact between the upper right hand corner of the body of the truck and the knee brace of the overpass, causing a piece of metal about ⅜" thick to be torn

from the truck, the truck continued on for some distance at the same rate of speed because the brakes were not functioning properly. The driver was unable to turn away from the automobile occupied by plaintiff and off the pavement because of some defect in the steering mechanism. It would be contrary to the law of physics and the direct testimony to maintain that the slight contact between the upper right corner of the truck's cab and the overpass in any way affected the truck's braking or steering mechanism.

The question of proximate cause is ordinarily submitted to the jury. However, where the evidence concerning proximate cause is not substantially conflicting and is susceptible of but one reasonable inference the question of the proximate cause of a plaintiff's injury is then a question of law for the court. Such was the status of the evidence in this case and we submit that the trial court should have directed a verdict in appellant's favor.

CONCLUSION

The record in this case compels the following conclusions:

1. Appellee released all claims arising out of the accident when she executed the covenant.

2. The trial court erred to the prejudice of appellant in instructing the jury.

3. There was no evidence of negligence on the part of appellant which was a proximate cause of the accident.

Respectfully submitted,

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,

JOHN GORDON GEARIN,

OGLESBY H. YOUNG.

No. 13443

United States
Court of Appeals
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant,

vs.

ALMA RAISH,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13443

United States
Court of Appeals
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant,

vs.

ALMA RAISH,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

KOERNER, YOUNG, McCOLLOCH and
DEZENDORF,
JOHN GORDON GEARIN,
OGLESBY H. YOUNG,

800 Pacific Building, Portland, Oregon,

Attorneys for Appellant.

VERGEER & SAMUELS,
HARRY F. SAMUELS,

Portland Trust Bldg., Portland, Oregon,

Attorneys for Appellee.

In the United States District Court for the District of Oregon

Civil No. 6141

ALMA RAISH,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Defendant.

PRE-TRIAL ORDER

The above entitled cause came on regularly for pre-trial conference before the undersigned Judge of the above entitled Court on Monday, January 21, 1952. Plaintiff appeared in person and by Harry F. Samuels of her attorneys and defendant appeared by John Gordon Gearin, one of its attorneys.

The parties with the approval of the Court agreed to the following:

STATEMENT OF FACTS

I.

At all times mentioned in plaintiff's complaint, plaintiff was and now is a resident of the State of Oregon, and defendant was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and is authorized to do business in the State of Oregon. The amount in controversy, exclusive of interest and costs exceeds the sum of $3,000.00.

II.

On or about the 17th day of October, 1950, plaintiff was seated in an automobile parked upon the west shoulder of U. S. Highway No. 99 some feet south of the underpass over said highway, which said railroad overpass was owned and maintained by defendant Southern Pacific Company. Said overpass is located a short distance south of Eugene, Oregon.

III.

At said time and place the automobile in which plaintiff was seated was struck by a truck and trailer owned and operated by Los Angeles-Seattle Motor Express, Inc., a Washington corporation, as a result of which plaintiff received some injury. Immediately prior thereto the truck and trailer of Los Angeles-Seattle Motor Express, Inc., collided with a portion of said railroad overpass when its driver Thomas Ivisin Embleton swerved to his right to avoid colliding with a northbound truck which was entering the underpass and which was being driven partially over the center line of said highway.

IV.

Thomas Ivisin Embleton was familiar with the existence and location of said underpass and had driven similar equipment through the same on prior occasions.

V.

Thereafter plaintiff made claim for damages against Los Angeles-Seattle Motor Express, Inc.,

and on or about the 26th day of July, 1951, Transport Indemnity Company, a corporation, for and on behalf of Los Angeles-Seattle Motor Express, Inc., paid to plaintiff the sum of $27,000.00 in consideration for the execution by plaintiff of a document entitled "covenant not to execute".

PLAINTIFF'S CONTENTION

I.

Plaintiff contends that by reason of the negligence of defendant the truck and trailer of Los Angeles-Seattle Motor Express, Inc., was caused to collide with said railroad overpass causing the same to go out of control and to collide with the vehicle in which plaintiff was seated.

II.

Plaintiff contends that defendant was negligent in the following particulars:

(a) In that it constructed and maintained its overhead crossing at a heighth insufficient for the safe passage of persons making ordinary use of the public highway;

(b) In that it constructed and maintained its overhead crossing at a width insufficient for the safe passage of persons making ordinary use of the public highway;

(c) In that it failed to maintain a true and correct notice to the public of the clearance between the highway and the overhead obstruction;

(d) In that it posted and maintained an inaccurate and misleading notice, and a notice which indicated to the public, particularly persons operat-

ing vehicles upon the public highway, that the clearance was greater than actually existed at the time and place of the collision herein described.

III.

Plaintiff further contends that as a proximate result of the negligence of defendant, plaintiff received the following injuries: She was generally bruised and battered, and suffered many lacerations about her body, and suffered shock and damage to her nervous system; a fracture of the right scapola and plaintiff suffered multiple fractures to the pelvis with deformities; and fractures of several ribs with deformities; and fracture of the distal one-half portions of each clavicle with deformities; and tearing of the soft tissue and flesh of the right leg above the ankle; and the muscles, tendons and ligaments and soft tissues and nerves of her hand and left leg, hips and back were torn, wrenched and damaged; and plaintiff suffered damage to the veins of the left leg which impairs the blood circulation in that portion of her body; and plaintiff suffered a thrombo-phlebitis; and a phlebo-thrombosis and plaintiff suffered damage to the nerves of her upper lip and nose, with loss of sensation. Plaintiff contends that prior to the occurrence of this collision she was a well, healthy and able-bodied woman, and that as a result of the said injuries as described herein, she has been rendered sick, sore and lame, and suffered extreme and excruciating plain and anguish, and will continue to suffer and to be lame and disabled for the balance of her lifetime, and that as a result thereof she has been

generally damaged in the sum of $100,000.00. Plaintiff was at the time of the accident 56 years of age with a life expectancy of .... years.

Plaintiff further contends that as a result of said injuries as formerly described herein, she has been required to have hospitalization, has been required to employ the services of physicians and surgeons to take care of her, and to have X-rays taken, to purchase medicine and surgical dressings, and to employ an ambulance, and that she will require said medical care and attention in the future; that in treatment of said injuries, plaintiff has incurred the following medical bills and expenses: Rental for crutches from the Eugene Brace and Limb Shop, $4.00; Medical expense from Dr. Tom Mulholland, $53.00; Ambulance service from the Valley Ambulance Service, $30.00; Medical bill from Dr. E. D. Furrer, $10.00; Medical bill from Dr. Howard A. Molter, $389.50; Medical bill from Dr Leonard D. Jacobson, $51.50; Surgical Hose, $20.50; Hospital bill at Sacred Heart General Hospital, Eugene, Oregon, $1,396.80; Dr. Wallace Baldwin, $330.50.

Defendants admits that the said bills and expenses were incurred by plaintiff, and that the charges for the same are reasonable.

V.

Defendant admits that plaintiff was employed as a car man's helper at an average salary of $257.32 per month at the time of the collision herein described, and that she has lost income to date in the sum of $4,503.10, and will lose wages in the future. Defendant admits amount of her wage rate.

Defendant, except as specifically admitted herein, denies the foregoing and denies that it was negligent in any particular charged by plaintiff or that any act or omission on its part constituted a proximate cause of plaintiff's injury and damage. Defendant, however, admits that as a result of said collision, plaintiff received some injury, was hospitalized and lost some time from her work.

DEFENDANT'S CONTENTIONS

I.

Defendant contends that the sole proximate cause of the collision between the automobile in which plaintiff was seated and the truck and trailer of Los Angeles-Seattle Motor Express, Inc., was the negligence of Thomas Ivisin Embleton, who was at the time and place of the accident acting as an employee of Los Angeles-Seattle Motor Express, Inc., in the scope of his employment as truck driver.

II.

Defendant further contends that said Thomas Ivisin Embleton was negligent in that:

(1) He drove and operated said truck and trailer at a speed greater than was reasonable or prudent under the circumstances then and there existing;

(2) He failed to have said truck under proper or any control;

(3) He drove and operated said truck and trailer without adequate or efficient brakes thereon;

(4) He failed to maintain proper or any lookout;

(5 He operated said truck at an excessive and unlawful heighth.

(6) He operated said truck at an excessive and unlawful weight.

(7) He operated said truck at a time when the same was equipped without adequate or proper steering mechanism thereon.

III.

Defendant further contends that the payment to plaintiff by Transport Indemnity Company of the sum of $27,000.00 was in full payment and satisfaction of whatever injury and damage she sustained.

IV.

Defendant further contends that the execution by plaintiff of the document entitled "covenant not to execute" was a release of Los Angeles-Seattle Motor Express, Inc., and as a matter of law a release of defendant.

Plaintiff denies the foregoing.

ISSUES OF FACT TO BE DETERMINED

I.

Was defendant guilty of negligence in any particular charged by plaintiff, and if so was such negligence a proximate cause of plaintiff's injury and damage?

II.

Was Thomas Ivisin Embleton guilty of negligence constituting the sole proximate cause of the collision and of plaintiff's injury and damage?

III.

What is the nature and extent of plaintiff's injury and damage?

IV.

Did the payment of the sum of $27,000.00 paid to plaintiff constitute full payment and satisfaction of plaintiff's injury and damage?

ISSUES OF LAW TO BE DETERMINED

I.

Did the execution by plaintiff of the covenant not to execute constitute a release of Los Angeles-Seattle Motor Express, Inc., and if so did such release operate to release plaintiff's claim against defendant?

EXHIBITS

Certain physical exhibits have been identified and received as pre-trial exhibits, the parties agreeing with the approval of the Court that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the ground of relevancy, competency and materiality.

Plaintiff's Exhibits

1. Transcript of testimony taken at Eugene, Oregon.

2. Photostatic copy of Tachograph (objection to the foregoing being a copy of the original being expressly waived).

3. Panoramic pictorial photographic view of scene of accident.

4. Photographs.

5. Medical report and notes of Dr. Howard A. Molter.

6. Medical report and notes of Dr. Paul B. Hansen (copy).

7. Deposition and medical report and notes of Dr. W. E. Baldwin.

8. Medical report and notes of Dr. Leonard Jacobson.

9. X-ray photographs taken on behalf of Dr. Paul B. Hansen.

10. Deposition of Thomas I. Embleton.

11. Deposition of plaintiff.

12. Hospital and medical bills, ambulance and drug bills.

13. X-ray photograph of Drs. Slocum and Molter.

14. Topographical map of scene of accident made by Ralph L. Follett.

15. Original Tachograph.

16. Oregon State Highway Department record.

17. Copy of letter from Oregon State Highway Commission.

18. Plaintiff's sealed exhibit A. (18 to 37 inclusive for impeachment purposes only.)

19. Plaintiff's sealed exhibit B.

20. Plaintiff's sealed exhibit C.

21. Plaintiff's sealed exhibit D.

22. Plaintiff's sealed exhibit E.

23. Plaintiff's sealed exhibit F.

24. Plaintiff's sealed exhibit G.

25. Plaintiff's sealed exhibit H.

26. Plaintiff's sealed exhibit I.

27. Plaintiff's sealed exhibit J.

28. Plaintiff's sealed exhibit K.

29. Plaintiff's sealed exhibit L.

30. Plaintiff's sealed exhibit M.
31. Plaintiff's sealed exhibit N.
32. Plaintiff's sealed exhibit O.
33. Plaintiff's sealed exhibit P.
34. Plaintiff's sealed exhibit Q.
35. Plaintiff's sealed exhibit R.
36. Plaintiff's sealed exhibit S.
37. Plaintiff's sealed exhibit T.
38. Covenant not to execute.
39. Photostatic copy of draft.
39-.a Bills of Lading.
39-b. Officer Hulett's notes.
40. Deposition of Dr. Howard Molter.
41. Deposition of Dr. Leonard Jacobson.
42. X-rays and medical notes.

Defendant's Exhibits

11. Deposition of plaintiff as an adverse party.
40. Deposition of Mike McCrary.
38. Covenant not to execute executed by plaintiff on July 26, 1951.
1. Transcript of testimony of preliminary hearing on Thomas Ivisin Embleton.
41. Defendant's interrogatives to plaintiff.
42. Plaintiff's answers.
43. Request for admissions.
44. Answer to request for admissions.
45 to 55 (inclusive) Photographs.
57. Map.
58. Map.
59. Deposition of Dr. John Marxer.
60. Sealed exhibit (for impeachment purposes only).

61. Statement of Embleton.
62. Dr. Marxer's X-rays.
63. Transcript of testimony of first trial.

Jury Trial

Plaintiff and Defendant made timely request for trial by jury.

The parties hereto agree to the foregoing pre-trial order and the Court being fully advised in the premises:

Now Orders that the foregoing pre-trial order shall not be amended except by consent of both parties, or to prevent manifest injustice and

It Is Further Ordered that the pre-trial order supersedes all pleadings; and

It Is Further Ordered that upon trial of this cause, no proof shall be required as to matters of fact hereinabove specifically found to be admitted, but that proof upon the issues of fact and law between plaintiff and defendant as hereinabove stated shall be had.

Dated at Portland, Oregon, this 23rd day of January, 1952.

/s/ GUS J. SOLOMON,
Judge

Approved:

/s/ HARRY F. SAMUELS,
of Attorneys for Plaintiff.

/s/ JOHN GORDON GEARIN,
of Attorneys for Defendant.

[Endorsed]: Filed January 23, 1952.

[Title of District Court and Cause.]

VERDICT

We the jury duly empaneled and sworn to try the above entitled cause find our verdict in favor of the plaintiff and against the defendant and assess damages in the sum of $41,500.00.

/s/ C. F. CALKINS,
Foreman

[Endorsed]: Filed April 11, 1952.

In the United States District Court for the District of Oregon

Civil No. 6141

ALMA RAISH,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Defendant.

JUDGMENT

The above entitled matter came on for trial on the 10th day of April, 1952, before a jury, in the Court of the Honorable Gus Solomon, at which time plaintiff appeared in the person and by and through her attorneys Duane Vergeer and Harry F. Samuels, and defendant appeared by and through its attorneys John Gordon Gearin and Oglesby Young,

at which time a jury was duly and regularly impaneled and sworn to try the entitled cause; opening statements were made by the respective counsel, evidence was produced by the plaintiff and defendant, and at the close of said evidence the jury was duly instructed by the Court as to the law of the case, the jury then retired to deliberate upon its verdict and after due deliberation returned into Court its verdict, title and venue omitted, as follows:

> "We the jury duly impaneled and sworn to try the above entitled cause, find our verdict in favor of the plaintiff and against the defendant, and assess damages in the sum of $41,-500.00.
>
> C. F. CALKINS
> Foreman"

and there having been introduced into evidence an agreement not to execute which the Court has heretofore construed as being in the nature of a covenant not to sue, and the Court having deducted from the amount of said verdict in the sum of $27,000.00, and plaintiff having moved for Judgment herein, now, therefore,

It Is Hereby Ordered and Adjudged that Judgment be and the same hereby is entered in this Court in favor of the plaintiff and against the defendant in the sum of $14,500.00, and

It Is Further Ordered and Adjudged that judgment be and hereby is entered in favor of the plaintiff and against the defendant for plaintiff's costs

and disbursements herein taxed and allowed in the sum of .....

Dated this 7th day of May, 1952.

/s/ GUS J. SOLOMON,
Judge

[Endorsed]: Filed May 7, 1952.

[Title of District Court and Cause.]

MOTIONS FOR NEW TRIAL AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Comes now defendant Southern Pacific Company and moves the Court for an order setting aside the verdict of the jury in favor of plaintiff and against defendant, received herein on Friday, April 11, 1952, and for judgment in favor of defendant in accordance with its motion for directed verdict made at the close of all the evidence, which said motion on behalf of defendant for directed verdict was taken under advisement and was not granted.

The grounds of this motion are the same as those interposed by defendant in its said motion for directed verdict, and are as follows:

1. There was no evidence that defendant was guilty of negligence in any particular charged by plaintiff.

2. Or that any act or omission on the part of defendant constituted a proximate cause of plaintiff's injury and damage.

3. (In the alternative and as a correlary to ground No. 2, supra.) In negligence of the driver

of the truck of Los Angeles-Seattle Motor Express, Inc., alone or in conjunction with that of the unidentified driver of the red truck, constituted the sole proximate cause of plaintiff's injury and damage.

4. The sum of $27,000.00 admittedly paid to plaintiff for and on behalf of Los Angeles-Seattle Motor Express, Inc., constituted as a matter of law full compensation to plaintiff for her injuries and damage.

5. The document entitled Covenant not to Execute, which was executed by plaintiff in consideration for the payment on behalf of Los Angeles-Seattle Motor Express, Inc., of the sum of $27,000.00 was, as a matter of law, a release inuring to the benefit of defendant Southern Pacific Company, and as a matter of law released said defendant from all liability to plaintiff on account of the injuries and damage which she sustained.

* * * *

In the alternative, and pursuant to the provisions of Rule 50(b) of the Federal Rules of Civil Procedure, defendant moves the Court for a new trial for any one of the following causes materially affecting the substantial rights of the defendant.

1. Excessive damages appearing to have been given under the influence of passion or prejudice.

2. Insufficiency of the evidence to justify the verdict and that said verdict is against law.

3. Error in law occurring at the trial and excepted to by defendant.

* * * *

In support of defendant's motion for new trial No. 3, supra, the defendant will contend that the Court erred in the following respects:

(a) The Court failed to give defendant's requested instruction No. I as follows:

A. Plaintiff has failed to establish by satisfactory evidence that defendant was guilty of negligence in any particular charge,

B. Or that any act or omission on its part constituted a proximate cause of the plaintiff's injuries and damage.

C. Your verdict therefore must be against plaintiff and in favor of the defendant.

(b) The Court failed to give defendant's alternative requested instruction No. II as follows:

A. It affirmatively appears from the satisfactory evidence that the driver of the truck which struck the automobile in which plaintiff was seated was guilty of negligence which constituted the sole proximate cause of plaintiff's injuries and damage.

B. Your verdict therefore must be against plaintiff and in favor of defendant.

(c) The Court failed to give defendant's alternative requested instruction No. III as follows:

A. It affirmatively appears from the satisfactory evidence that plaintiff has received the sum of $27,000.00 on behalf of her injuries and damage and that said sum of $27,000.00 is full compensation to plaintiff.

B. Your verdict therefore must be against plaintiff and in favor of defendant.

(d) The Court failed to give defendant's alternative requested instruction No. IV as follows:

A. It affirmatively appears from the satisfactory evidence that plaintiff has released Los Angeles-Seattle Motor Express, Inc., of any claim which she might have arising out of the accident in question.

B. Your verdict therefore must be against plaintiff and in favor of defendant.

(e) As a correlary to said instruction, and in conjunction therewith the Court erred in failing to construe said written document as a release.

(f) The Court failed to give defendant's requested instruction No. VI as follows:

A. Plaintiff must sustain the burden of proof against defendant by satisfactory evidence.

B. Evidence is satisfactory only if it produces moral certainty or conviction in an unprejudiced mind.

C. Only evidence which produces such moral certainty or conviction is sufficient to justify your verdict. Any evidence less than this is insufficient.

(g) The Court failed to give defendant's requested instruction No. VII as follows:

A. Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a heighth insufficient for the safe passage of persons making ordinary use of the public highway.

B. I instruct you that there is no evidence to support this charge.

C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case.

(h) The Court failed to give defendant's requested instruction No. VIII as follows:

A. Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a width insufficient for the safe passage of persons making ordinary use of a public highway.

B. I instruct you that there is no evidence to support this charge.

C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case.

(i) The Court failed to give defendant's requested instruction No. XIV (c) as follows:

In connection with the charge that the truck of Los Angeles-Seattle Motor Express was being operated without adequate or efficient brakes thereon, I instruct you that there was applicable at the time and place of the accident the following statute of the State of Oregon. (To the Court see 8 O.C.L.A., Sec. 115-376(e):

"(e) The brakes of a motor vehicle or combination of vehicles shall be deemed adequate when on a dry, hard, approximately level stretch of highway, free from loose material, such brakes shall be capable of stopping the motor vehicle or combination of vehicles, when operating at speeds set forth in the following table, within the distances set opposite such speeds, * * *

Miles per Hour	Stopping Distance
10	9.3 feet
15	20.8 feet
20	37.0 feet
25	58.0 feet
30	83.3 feet"

(j) The Court failed to give defendant's requested instruction No. XIV (D) as follows:

Violation of the foregoing statute is negligence as a matter of law.

(k) The Court failed to give defendant's requested instruction No. XIV (E) as follows:

You are instructed that the violation of or failure to obey the requirements of a law which for safety or protection of others commands or requires certain acts or conduct or forbids or prohibits certain acts or conduct is negligence per se, or in other words negligence in and of itself, regardless of what an ordinarily careful and prudent person might do in the absence of such law.

(l) The Court failed to give defendant's requested instruction No. XXI as follows:

If you come to a consideration of the question of damages, I instruct you that before you can award plaintiff any sum of money for alleged permanent injuries, you must be convinced by a preponderance of the satisfactory evidence that permanent injuries are probable. It is not sufficient that permanent injuries are merely possible.

* * * *

The instructions requested by defendant were prefaced by the following:

"The Court will understand that each subdivision of any instruction is to be deemed a separate and complete instruction."

(m) The Court erred in instructing the jury as follows:

"Vehicular traffic is entitled to use the entire roadway including the shoulders and, in determining whether defendant maintained its overhead crossing with sufficient clearance, you are to consider whether an obstruction was being maintained over them, or any part of the roadway including the shoulders.

(n) The Court erred in instructing the jury as follows:

"* * * in absence of notice to the contrary, the drivers of vehicles had a right to assume that the defendant would not maintain an obstruction to the highway which would be dangerous to those using it by ordinary means. Of course if the danger was so obvious and apparent that persons, in the exercise of ordinary care, would have seen it, particularly drivers who had passed under it on numerous occasions would be charged with notice of it.

(o) The Court erred in failing to submit to the jury the defendant's charge that the driver of the Los Angeles-Seattle Motor Express, Inc.'s truck and trailer was guilty of negligence in operating the same without proper or efficient steering mechanism thereon.

(p) The Court erred in permitting the plaintiff to testify concerning her intent or mental attitude and/or the circumstances surrounding the execution of the document entitled Covenant not to Execute.

(The defendant immediately after the receipt of the verdict requested the Court Reporter to prepare a transcript of testimony of the above cause, and the same has not as yet been received. It is impossible therefore for defendant at this time to set

forth the testimony of the plaintiff in this respect, and defendant respectfully requests the permission of the Court to supplement this motion by said testimony at the time the transcript of testimony is received from the Court Reporter.)

/s/ KOERNER, YOUNG, McCOLLOCH and DEZENDORF,
/s/ JOHN GORDON GEARIN,
/s/ OGLESBY H. YOUNG,
Attorneys for Defendants Southern Pacific Company

I, John Gordon Gearin, one of attorneys for defendant Southern Pacific Company hereby certify that the foregoing motions are made in good faith, not for the purpose of delay and that the same are in my opinion well founded in law.

/s/ JOHN GORDON GEARIN

Acknowledgment of Service attached.

[Endorsed]: Filed April 21, 1952.

[Title of District Court and Cause.]

ORDER

On the 5th day of May, 1952, defendant's motions for new trial and for judgment notwithstanding the verdict came on regularly for hearing before the undersigned Judge of the above entitled Court. Plaintiff appeared by her attorneys Duane Vergeer and Harry Samuels. Defendant appeared by one of

its attorneys John Gordon Gearin. The Court having heard the argument of counsel for the respective parties, having considered the authorities submitted and being fully advised does now

Order that said motions be and the same hereby are denied.

Dated at Portland, Oregon, this 7th day of May, 1952.

/s/ GUS J. SOLOMON,
Judge

[Endorsed]: Filed June 25, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Southern Pacific Company, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain final judgment entered in the above entitled action on May 7, 1952, and from the whole thereof.

Dated at Portland, Oregon, this 29th day of May, 1952.

/s/ KOERNER, YOUNG, McCOLLOCH
and DEZENDORF,
/s/ JOHN GORDON GEARIN,
/s/ OGLESBY H. YOUNG,
Attorneys for Appellant

[Endorsed]: Filed May 29, 1952.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between counsel for respective parties that the exhibits admitted in evidence at the trial of the above cause may be considered upon this appeal in their original form, without necessity for reproducing or printing the same.

Dated at Portland, Oregon, this 15th day of May, 1952.

/s/ HARRY F. SAMUELS,
Of Attorneys for Plaintiff
/s/ OGLESBY H. YOUNG,
Of Attorneys for Defendant

[Endorsed]: Filed May 29, 1952.

[Title of District Court and Cause.]

ORDER

The Motion of defendant Southern Pacific Company, based upon Stipulation of counsel for the respective parties on file herein for an order authorizing the transmission of the original exhibits in this case to the Clerk of the United States Court of Appeals for the Ninth Circuit, together with the Transcript of Record, coming on at this time regularly to be heard; and the court being fully advised in the premises, it is

Ordered that the Clerk of this court transmit all of the exhibits introduced in evidence upon the trial

of the above entitled cause with the Transcript of Record to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit for the use of the judges thereof, said exhibits by him to be preserved and returned to the Clerk of this Court upon disposition of the appeal.

Dated this 2nd day of June, 1952.

/s/ GUS J. SOLOMON,
Judge

[Endorsed]: Filed June 2, 1952.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents: that we, Southern Pacific Company, a corporation, as Principal, and Indemnity Insurance Company of North America, a corporation, as Surety, are held and firmly bound unto Alma Raish in the full and just sum of Sixteen Thousand Dollars ($16,000.00) to be paid to the said Alma Raish, her executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of May in the year of our Lord One Thousand Nine Hundred Fifty-Two.

Whereas, lately in the United States District Court for the District of Oregon in a cause pending in said Court between Alma Raish, plaintiff and Southern Pacific Company, a corporation, defend-

ant, a judgment was rendered against the said Southern Pacific Company, and the said Southern Pacific Company having filed in said Court a Notice of Appeal to reverse the judgment in the aforesaid cause, in which notice was given that appeal was taken to the United States Court of Appeals for the Ninth Circuit;

Now, the condition of the above obligation is such that if the said Southern Pacific Company shall prosecute its appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is delayed, or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award if it fails to make its appeal good, then the above obligation to be void; else to remain in full force and effect.

SOUTHERN PACIFIC COMPANY,
a corporation,
/s/ By OGLESBY H. YOUNG,
Of its Attorneys,
Principal

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a corporation,
/s/ By [Illegible] [Seal]
Attorney-in-fact
Surety

Countersigned:

CHARLES W. SEXTON COMPANY,
/s/ By C. D. GREW,
Resident Agent and Attorney-in-fact.

ORDER

The foregoing bond is hereby approved and is to stand as a supersedeas until the final determination of the appeal.

Dated this 29th day of May, 1952.

/s/ GUS J. SOLOMON,
Judge

Consent is hereby given to entry of the foregoing Order.

/s/ DUANE VERGEER,
Of Attorneys for Plaintiff

Acknowledgment of Service attached.

[Endorsed]: Filed June 2, 1952.

[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED BY DEFENDANTS

* * * * *

VI.

A. Plaintiff must sustain the burden of proof against defendant by satisfactory evidence.

B. Evidence is satisfactory only if it produces moral certainty or conviction in an unprejudiced mind.

C. Only evidence which produces such moral certainty or conviction is sufficient to justify your verdict. Any evidence less than this is insufficient.

VII.

A. Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a heighth insufficient for the safe passage of persons making ordinary use of the public highway.

B. I instruct you that there is no evidence to support this charge.

C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case.

VIII.

A. Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a width insufficient for the safe passage of persons making ordinary use of a public highway.

B. I instruct you that there is no evidence to support this charge.

C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case.

If the Court should decline to grant defendant's requested Instructions Nos. VII and VIII, or either of them, or any subdivision thereof, defendant without waiving the request, saves an exception and asks that the following alternative instruction be given:

* * * * *

XIV.

C. In connection with the charge that the truck of Los Angeles-Seattle Motor Express was being operated without adequate or efficient brakes thereon, I instruct you that there was applicable at the time and place of the accident the following statute of the State of Oregon. (To the Court see 8 O.C.L.A., Sec. 115-376 (e):

"(e) The brakes of a motor vehicle or combination of vehicles shall be deemed adequate when, on a dry, hard, approximately level stretch of highway, free from loose material, such brakes shall be capable of stopping the motor vehicle or combination of vehicles, when operating at speeds set forth in the following table, within the distances set opposite such speeds, * * *

Miles per Hour	Stopping Distance
10	9.3 feet
15	20.8 feet
20	37.0 feet
25	58.0 feet
30	83.3 feet"

D. Violation of the foregoing statutes is negligence as a matter of law.

E. You are instructed that the violation of or failure to obey the requirements of a law which for safety or protection of others commands or requires certain acts or conduct or forbids or prohibits certain acts or conduct is negligence per se, or in other words negligence in and of itself, regardless of what an ordinarily careful and prudent person might do in the absence of such law.

* * * * *

XVII.

If you should believe from the satisfactory evidence that at the time plaintiff executed the agreement entitled "Not to Execute" on July 26, 1951, plaintiff did not expressly reserve the right to sue Southern Pacific Company, then in that event I instruct you that plaintiff can not recover and your verdict must be against plaintiff and in favor of defendant. * * * * *

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of pre-trial order, verdict, judgment, motion for new trial and for judgment notwithstanding the verdict, order denying motion for new trial, etc, notice of appeal, supersedeas bond, stipulation re original exhibits, order to send original exhibits, statement of points, designation of record on appeal, and transcript of docket entries, constitute the record on appeal from a judgment of said court of a cause therein numbered Civil 6141, in which Alma Raish is plaintiff and appellee, and the Southern Pacific Company, a corporation, is defendant and appellant; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there will be forwarded to you under separate cover exhibits Nos. 2, 3, 4a, 4b,

4c, 4h, 4k, 4l, 4p, 4q, 9, 13, 14, 15, 38, 45, 55, 57, 58 and 62. Also that appellant will send later a transcript of testimony of April 10, 11, 1952, the original of which is on file in this office. Copy of requested instructions by defendant is herewith enclosed, although not on file in this office.

I further certify that the cost of filing the notice of appeal, $5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 26th day of June, 1952.

[Seal] LOWELL MUNDORFF,
Clerk

In the United States District for the District of Oregon

Civil No. 6141

ALMA RAISH,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Defendant.

Before: Honorable Gus J. Solomon, Judge.

Appearances: Messrs. Vergeer & Samuels (Duane Vergeer and Harry F. Samuels), Attorneys at Law, Portland, Oregon, for Plaintiff. Messrs. Koerner, Young, McColloch & Dezendorf (Oglesby H. Young and John Gordon Gearin), Attorneys at Law, Portland, Oregon, for Defendant.

Court Reporter: Herbert W. White, Jr.

TRANSCRIPT OF TESTIMONY

Portland, Oregon, April 10, 1952, 10 a.m.

(A Jury was duly and regularly impaneled and sworn to try the [1*] above-entitled cause.)

Opening statements were made to the Jury by Counsel for the respective parties, after which the following proceedings were had:

The Court: Call your first witness.

Mr. Samuels: We will call Mr. Ralph L. Follette.

RALPH L. FOLLETTE

thereupon produced as a witness in behalf of the plaintiff having been duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Samuels): Will you state your name, please? A. Ralph L. Follette.

Q. Where do you live.

A. In Eugene, Oregon.

Q. How long have you lived there?

A. Since 1945 some time.

Q. What is your occupation?

A. Civil Engineer and surveyor.

Q. By whom are you employed?

A. By myself.

Q. How long have you been doing that type of work?

A. I have been doing that work for about 25 years; in Eugene, for the last seven years. [2]

---

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Ralph L. Follette.)

Q. Did you have occasion to go out to the underpass, we are talking about here, located slightly west of the Springfield Junction? A. Yes.

Q. Did you make a topographical map of that place?

A. Yes. The day after the accident I was asked by the agent of the Transport Indemnity Company to make a topographical map of that underpass.

Q. Did you do that? A. Yes, I did.

Q. I will ask you if that is the map that is there on the board? A. Yes, that is the map.

Mr. Samuels: I would like to offer that in evidence if it isn't in evidence now.

Mr. Gearin: No objection.

The Court: It may be admitted.

(A large map was then offered and received in evidence as Exhibit No. 3 for Plaintiff.)

Q. (By Mr. Samuels): I will ask you, Mr. Follotte, if you would mind stepping down and explaining to the Jury the way the highway on the map is situated and so on.

The Court: He may put the map in front of the Jury, if he wishes. [3]

(The witness stepped down from the witness chair to use the map.)

Q. (By Mr. Samuels): Let me ask you first, Mr. Follette, to point out to the Jury what road runs there?

A. The road doesn't show on the map the way it is folded now. It isn't spread out far enough. May I spread it out more?

(Testimony of Ralph L. Follette.)

Mr. Samuels: If you wish and it will help, Mr. Follette.

(The witness then spread out the map.)

A. (Continued) The way the map is here, this is the north, (indicating) to this point there the highway would be north and south with this point north. Coming south you would be coming from this direction, going down and through the underpass here, (indicating). The highway lies right here (indicating) and the railroad at this angle here, so when you go through the underpass you are not quite square with the railroad. This county road that comes in here (indicating) is on the south side of it and is shown coming in right here. The transport truck was coming from the north, coming down through here (indicating) to where it ended up over on this side (indicating).

Q. Does that highway run generally north and south?

A. Yes, that highway runs generally north and south.

Q. What is the direction of the railroad bridge that goes across it? [4]

A. That is generally east and west.

Q. Is it a true north and a true east; is it at a true right angle?

A. True north is this way; they don't cross at true right angles. There are a few degrees that they are off. It isn't a true 90° angle.

Q. Referring to your diagram at the lower right hand part of your chart, what does that show?

(Testimony of Ralph L. Follette.)

A. Well to start with, the chart in the lower left hand corner, that is a full size scale opening of the pass if you were right square with it, then it is the same as if you were coming directly through it. That would narrow down on the opening beyond there on the right. This is one side of it, not the full size opening due to the angle across it.

Q. At the time you made this drawing, how wide was the pavement as to the edge of it as you enter the underpass on the north?

A. Well, I measured it there and it was 8 feet 8 inches as you enter the underpass on the north from the center of the yellow stripe to each pavement edge.

Q. Going on through it to the east edge of the road, how far would that be?

A. Eight feet 4 inches.

Q. Is that from the center of the pavement?

A. Yes, it would be a total of 17 feet then.

Q. Is there a shoulder there or was there at that time? [5]

A. Yes, a very narrow shoulder. From the pavement over on the right hand side over to the concrete pier or brace was 17 inches. On the left hand side as you go in, that would be on this corner over here (indicating), there was a 26 inch shoulder.

Q. There isn't any question that the right hand side is the west side, is there?

A. That is correct. You enter from the north going south.

Q. What is the condition of the pavement as to being flat or level?

(Testimony of Ralph L. Follette.)

A. Well, I took the levels in there and measured the clearance there several places under the bridge —you mean through there on a general projectile?

Q. Yes, on a general projectile.

A. Generally as you go through there, it curves back to the edge of the pavement. There is about, from the clearance of the edge of the pavement, about 12 feet 10 inches in the center to a little more on this side (indicating) 12 feet 10¼ inches here. I also state in there an inch and a quarter crown. Those two measurements don't exactly work out. I didn't have a chance to check it. They got it away from me before I could. I determined an inch and a quarter crown by that series of measurements through there.

Q. Referring to west edge of the pavement itself, was there—were there any depressions in there as you go through?

A. Just the normal edge of the highway. [6]

Q. Any mud shoulders, anything like that?

A. No, because there was no water in there, not when I got there the day after the accident. I wasn't there the day of the accident, but the usual gravel right in there, just the normal edge of the highway like it would be where you are always hitting, the edge is broken like any oiled road would get.

Q. Referring to the top of the drawing, what is the distance between the pavement level and the underpart of the underpass in the center?

A. In the center from the pavement level to the underside of that main bean, I measured 12 feet 10 inches.

(Testimony of Ralph L. Follette.)

Q. You have described some cross beams?

A. Yes, knee braces or whatever you want to cell them. They are on all four corners.

Q. Can you tell the Jury how far it is from the west edge of the pavement level to the lowest part of the angle iron up in the right hand corner, the distance between the pavement and the lowest part of the angle iron?

A. The angle irons are really square braces going at 45° angles but when you come around and look at it, due to the angle of crossing it narrows up. But beyond it the distance is the same but it will narrow it up to 25¾ inches compared to what you see because of the angle of the crossing. So from the edge of the pavement that would be sticking out there 2¾ inches. (Indicating). [7]

Q. Is that the portion of the angle iron that protrudes over the edge of the pavement itself?

A. It is clear right up at the top, just there over the edge of the pavement.

Q. Do they protrude over the pavement or just to the edge of it?

A. The way I have my figures it would show it extending 2 inches.

Q. Which way? A. Into the pavement.

Q. Over the pavement? A. Yes.

Q. What is the overall width between the steel uprights?

A. When it is square it is 24 feet between the main steel upright, but to this angle, it is 21½, effective clearance there.

(Testimony of Ralph L. Follette.)

Q. How far do these angle irons protrude out from the side?

A. It was 21¾ inches from each side. That would be 17′ 4″ clearance on the beam up above.

Q. You refer there to it as you see it when you approach it?

A. As you see it when you approach it from the road.

Mr. Samuels: You may take your seat again now. Please take the stand again now.

(The witness then returned to the stand.)

Mr. Samuels: We would like the tachograph, which is Plaintiff's Exhibit No. 2. Your Honor, [8] I will offer this in evidence now.

Mr. Gearin: No objection.

The Court: It may be admitted.

Mr. Samuels: There is the original tachograph in there someplace; it is No. 15. We will offer that at this time.

Mr. Gearin: No objection.

The Court: It may be admitted.

(An enlargement of a tachograph marked Plaintiff's Exhibit No. 2, and the original tachograph marked Plaintiff's Exhibit No. 15 were then offered and received in evidence.)

Q. (By Mr. Samuels): I am handing you both the photostatic copy of the tachograph that came on the truck, also the original and I will ask you to examine those and see if the blown up one is a true copy of the original?

(Testimony of Ralph L. Follette.)

A. Yes, I have seen both of these before and I can see no difference. They are the same. This (indicating) is the photostatic copy of the original.

Q. What is a tachograph?

A. That is just a clock, you might say, with this face here (indicating) and this line here is made with a recording needle, and it is sometimes referred to as a tattletale on the truck because it tells just what the truck is doing all the time. [9] When the truck is checked out, this rotates as the truck runs and the needle works on it when the clock is running so it records the maximum speed and the duration of that speed and then when the truck slows down for stoplights and all like that, it shows the slowing down and tells what the truck is doing from the time the truck is checked out until it goes back in.

Q. Are there lines on there? Do the small lines on there show what the speed of the truck is?

A. It records on the lines showing what the truck is doing all the time.

Q. Does that one which you have in your hand also have lines on it? A. Yes.

Q. Are you familiar with that type of an instrument? Can you read it? A. Yes.

Q. Will you tell us what that shows as far as the speed of the truck is concerned, from the time the truck stopped going back, in other words, from the place where the vehicle stopped going back through the bridge, what does the tachograph show as far as the speed is concerned?

A. When you take the last line on this, that is

(Testimony of Ralph L. Follette.)

where it shows the truck stopped—the long heavy line back into the first place where you have a vertical line, going to the top of that to where it changes or fluctuates, it reads just short of 30 [10] miles, probably between 28 or 25 miles, someplace right in there. Then it goes down to no speed shown, which would probably be back up at the Springfield "y" where the truck would have had to stop for a stoplight. So when I refer to the stoplight, that is right here (indicating). He had put it up to around 25 or 28 miles per hour when he started to slow down. You can see there is some distance in there shown by the time interval, but there is no considerable horizontal line showing speed to go on. According to that he was going just about 30 miles per hour at the time he stopped.

Q. How far is the "y" junction where the stoplight is to where the bridge is?

A. It is about 700 feet south of the Springfield "y".

Mr. Samuels: No further questions.

Cross Examination

Q. (By Mr. Young): Is it your testimony that you made that map at the request of the Transport Indemnity Company? A. Yes.

Q. How much notice did you have for making that map? A. Practically none.

Q. The map was made in quite a hurry?

A. Yes.

Q. I was down to your office in Eugene, wasn't I? [11] A. Yes.

(Testimony of Ralph L. Follette.)

Q. Didn't you admit in your office that the map could have been off some as far as distances were concerned?

A. It was made in an awful hurry, but the measurements that were taken were taken pretty carefully, and I doubt if you will find anything too much out of line.

Q. You have already admitted that your measurements were off as far as the clearance goes, isn't it?

A. No, not too much. Two measurements might differ a little on the pavement, because the oiled surface is pretty well worn and irregular.

Q. You have stated the pavement of the bridge portion of the highway under the underpass was 17 feet in width, isn't that correct? A. Yes.

Q. And then the clearance directly under the underpass between the two angle irons is 17 feet 4 inches, isn't that correct?

A. Well, if that is on the map—that sounds right.

Q. Would you mind checking the map to see if that is correct? A. Well, it sounds right.

(Mr. Follette goes to the map.)

A. (Continued): Yes, that is right.

Q. It was also your direct testimony that there was 21 feet 7½ inches clearance—what was that measurement? Was that as you face the underpass? [12]

A. Yes, that would be clear over in each direction. Stating that again, that is clear over to the main steel member.

(Testimony of Ralph L. Follette.)

Q. You stated that you figured that—did you actually measure that distance or just figure it?

A. I didn't just figure it. I actually measured it to find out those measurements. Then I checked it, so I have it both ways.

Mr. Young: No further questions.

Redirect Examination

Q. (By Mr. Samuels): That road that comes in, going south and comes in from the right, how far is the near edge of that road to the south edge of the underpass, do you have any idea?

A. Well, it is drawn there and it is to exact scale—about 50 feet.

Q. About 50 feet? A. Yes.

Mr. Samuels: That is all.

Mr. Young: That is all.

The Court: You are excused, Mr. Follette.

Witness excused.

Mr. Samuels: Call Mr. Hulett.

EUGENE G. HULETT

thereupon produced as a witness in behalf of the plaintiff, having been duly sworn, testified on examination as follows: [13]

Q. (By Mr. Samuels): Will you state your name name to the Jury, please?

A. A. Eugene G. Hulett.

Q. Where do you live, Mr. Hulett?

A. In Eugene.

Q. What is your occupation?

(Testimony of Eugene G. Hulett.)

A. I am a private in the Oregon State Police.

Q. On the 17th day of October, 1950, by whom were you employed?

A. By the State of Oregon, state police.

Q. Your duties at that time were what—what were your duties? A. Regular routine patrol.

Q. Did you have an occasion during the course of your employment as a police officer to go to the scene of this accident? A. Yes, I did.

Q. Do you recall about what time you arrived there?

A. I arrived at the scene of the accident at 1:40 p.m. on October 17, 1950.

Q. Do you recall the weather conditions?

A. It was raining.

Q. When you arrived there, what did you find, in particular, referring to the Los Angeles-Seattle Motor Express truck and passenger cars near there?

A. I observed 4 passenger cars there, a truck and a trailer. [14] Three of the passenger cars were facing east and west to the highway on the west side of Highway 99 in front of the Glenwood Auto Wreckers. Then I saw a Kaiser sedan, which had evidently collided with left side of one of these cars and a Los Angeles Seattle Freight truck was astraddle the middle portion of this Kaiser sedan. This was about 200 feet south of the underpass.

Q. Did you measure that? A. Yes.

Q. What was the distance between the rear of the Los Angeles-Seattle Motor Express Truck and the south edge of the underpass?

(Testimony of Eugene G. Hulett.)

A. From the driver axle of the truck to the underpass I measured 177 feet 4 inches.

Q. You said the pavement was wet, is that right at that time? A. Yes.

Q. Where was the truck in respect to the Kaiser automobile—I mean what were their positions to each other?

A. It was straddled, the front axle of the truck was straddling the whole body of the Kaiser sedan. The front axle was situated just about where the windshield of the Kaiser would be, up over the body of the Kaiser.

Q. On top of the car? A. Yes.

Q. The wheels of the front of the truck were off the ground? A. Yes, off the ground.

Q. Was Mrs. Raish in the car? [15]

A. Yes.

Q. Where was she?

A. She was pinned partially underneath the seat and underneath the dash.

Q. How long did it take you to get to the scene of the accident after you received the call?

A. Approximately 3 minutes.

Q. Where were you at the time of the call?

A. I was at 10th and Main Streets in Springfield, about 20 blocks from the accident.

Q. How did you receive the call?

A. By radio.

Q. Did you go there after you received the call?

A. I went there immediately.

Q. Did you stay at the scene of the accident until Mrs. Raish was removed? A. I did.

(Testimony of Eugene G. Hulett.)

Q. How long was she in that car?

A. Approximately an hour and a half.

Q. Do you recall how she was removed, how did you get here out?

A. By use of heavy equipment, as near as I can remember now.

Q. Would that pull the vehicles apart?

A. Yes.

Q. The car containing Mrs. Raish—did you take any measurements as to where it stopped after the accident with respect to the [16] west edge of the pavement? A. Yes.

Q. How far was it off the road?

A. From the center line of the highway to the center of the front axle of the Raish car was a distance of 21 feet 8 inches.

Q. That is from the center of the highway?

A. Yes.

Q. Do you know how far it was from the edge of the highway?

A. I don't know that exact measurement. I find the pavement at this point was 21 feet 1 inch in width.

Q. What was the distance from the center of the highway and the car?

A. 21 feet 8 inches.

Q. Where was the truck in respect to the nearest part of that vehicle, from either the center of the highway or the west edge?

A. Will you please repeat that?

Q. How far was it from either the center of

(Testimony of Eugene G. Hulett.)

the highway or the edge to the nearest part of the truck? A. 26 feet 4 inches.

Q. From which measurement?

A. From the center of the highway to the front axle.

Q. Could you tell, Officer Hulett, from looking at the pavement there or from your measurements, if the front wheels of the truck had been off the ground for any distance before they came to a stop? [17]

Mr. Gearin: Just a minute, I think that question should be objected to. It should be confined to a certain time and to certain points. The highway is very long and when Officer Hulett saw the truck—we should first find out if Officer Hulett saw the truck at any time when it was underneath the underpass.

The Court: I think the officer can testify and answer the question and tell us that.

Q. (By Mr. Samuels): Go ahead and answer the question, Officer Hulett.

A. That would be a very difficult question to answer. It appeared that this truck had been astraddle of this car for some distance, but I don't know how far.

Q. What was Mrs. Raish's condition when you saw her there?

Q. Oh, she was part of the time conscious, I should say most of the time she was conscious. There was only one time that I recall that I saw her that she appeared to be unconscious, I think.

(Testimony of Eugene G. Hulett.)

Q. Could you see any injuries to her at that time?

A. I didn't examine her, but she was severely injured, of course.

Mr. Samuels: No further questions.

Cross Examination [18]

Q. (By Mr. Gearin): Officer, you have been requested to attend this trial in behalf of the Southern Pacific Company too, haven't you?

A. I have.

Q. When you got there, this truck you might say generally ran right over the top of Mrs. Raish's car, isn't that right? A. That is right.

Q. When you got there the front wheels were about 2 feet off the ground? A. Yes.

Q. And was the truck on top of Mrs. Raish there and you could see where it hit and push the three cars in front of Mrs. Raish's car, couldn't you? A. That is right.

Q. All had banged up against a telephone pole there and had stopped? A. That is right.

Q. Now going back, I think you referred to your notes, Officer Hulett, and you said from the front axle of the truck itself, from the front wheel of the truck on the left side to the center line of the highway, you say was 26 feet 4 inches, is that right?

A. Yes.

Q. Then you take as the distance of the highway—did you determine how far it was from the edge of the highway? [19]

A. Approximately 10½ feet.

(Testimony of Eugene G. Hulett.)

Q. And from the rear axle of the truck down to the south side of the underpass was a distance, I believe you stated, of 177 feet 4 inches?

A. Yes.

Q. From the south side of the underpass to the front of the truck where the vehicles came to rest after the collision with the Raish car and the three other automobiles was an estimated distance of 215 feet, is that right? A. That is right.

Q. At the time of the accident as you approached the scene of the accident from the north, on the north side of the underpass, do you recall whether or not there is a street sign, a State Highway Department sign, on the right and another sign on the highway which contained these words, "Low, Narrow Bridge"? A. I believe so.

Q. There was at the time of this accident one of those signs?

A. I believe there was.

Q. Did you talk to Mr. Embleton, the driver, at the time of the accident after the accident?

A. At that time?

Q. After the accident, yes? A. Yes.

Q. What did he say to you with respect to his speed?

A. He told me he was driving in the neighborhood of 35 miles [20] between 30 and 35 miles per hour.

Q. Did he say anything to you at that time about his brakes? A. No.

Q. Did he say anything at that time about the steering mechanism of his truck? A. No.

(Testimony of Eugene G. Hulett.)

Q. Did he say anything at that time that he had run into the underpass?

A. I don't recall.

Q. Did he make any explanation at that time as to how the accident occurred?

A. There was some explanation made as to the damage to the truck when it hit the underpass, but not right at that time.

Q. Were you able to ascertain from your examination, Officer Hulett, whether or not it was the pole that stopped the motion of these cars and the truck? A. I would say that it did.

Mr. Gearin: That is all.

Redirect Examination

Q. (By Mr. Samuels): Did you see any damage to the truck other than the motor and underpart?

A. Other than what?

Q. Did you see any damage to the upper part of the truck [21] A. Yes.

Q. Where?

A. On the right hand upper corner.

Q. Will you describe that damage, please?

A. Oh, the box is made of aluminum alloy metal of some kind, and there was some aluminum metal taken off from the corner of the truck there, and there was some on the bridge.

Q. Did you examine the underpass or any part of it to see if there were any pieces there?

A. Yes.

Q. Were there any there? A. There were.

Mr. Samuels: I believe it will be stipulated be-

(Testimony of Eugene G. Hulett.)

tween the parties that this is the tachograph taken from the truck.

Mr. Gearin: We will have no objection.

The Court: It has already been admitted in evidence.

Mr. Samuels: We will offer Plaintiff's Exhibits No. 4-B and 4-A.

Mr. Gearin: We have no objection.

The Court: They will be admitted.

(Photographs, Plaintiff's Exhibits No. 4-A and 4-B were then offered and received in evidence.) [22]

Q. (By Mr. Samuels): I will ask you to tell the Jury what those pictures are taken of?

A. Exhibit No. 4-A shows the end of the underpass looking south, actually the west side of the underpass.

Q. You mentioned something about a piece of aluminum there. Is that shown in the picture?

A. Yes, I believe it is.

Q. Where is it?

A. The pieces are in the upper right had corner of the underpass, up underneath the underpass.

Q. Will you examine the other photograph and tell us what that shows?

A. That is No. 4-B. It is a photograph also of this same underpass, looking north and shows some pieces of metal hanging down from the ladder there.

Mr. Samuels: We will offer in evidence Plaintiff's Exhibits No. 4-L, 4-H, 4-K and 4-C.

(Testimony of Eugene G. Hulett.)

Mr. Gearin: We have no objections.

The Court: They will all be admitted.

(Plaintiff's Exhibits Nos. 4-C, 4-H, 4-K, and 4-L were then offered, marked and received in evidence.)

Q. (By Mr. Samuels): Would you just describe what those pictures are?

A. Exhibit No. 4-C is a photograph of the truck in question [23] astraddle this Kaiser sedan in front of the Glenwood Motors.

Q. That is the way the truck was when you saw it?

A. That is the way it would appear.

Q. Going through the other photographs quickly, officer, what are they?

A. Exhibit 4-K is the front end of the truck, evidently after it had been lifted off the Raish car.

Exhibit 4-H is the same just north of this, showing the underpass.

Exhibit 4-L shows the underpass looking at the scene of the accident from the north to the south through the underpass.

Mr. Samuels: No further questions.

Recross Examination

Q. (By Mr. Gearin): The damage that was sustained by the upper right hand corner of the truck when it came into contact with the underpass was just a little strip of metal that was torn off, wasn't it?

(Testimony of Eugene G. Hulett.)

A. There were a couple of pieces there.

Q. It was comparatively light metal?

A. Yes, aluminum is a light metal, yes.

Q. That could have been torn off quite easily by hitting the underpass? A. Yes. [24]

Q. I assume that you looked for evidence of skidmarks behind the Los Angeles-Seattle Motor truck, is that right? A. Yes, I did.

Q. And I take it you didn't find any?

A. I didn't.

Redirect Examination

Q. (By Mr. Samuels): Do you know, officer, as to how those trucks are constructed relative to the framework, what the framework is made of?

A. I believe it is metal.

Q. Was the metal on this truck bent, do you recall? A. I don't recall.

Mr. Samuels: That is all.

Mr. Gearin: No further questions.

The Court: You are excused.

Witness excused.

The Court: This might be a good time to take a noon recess, and then we can come back at 1:00. It gives you an hour and ten minutes.

Ladies and gentlemen you are excused now until one o'clock. Please remember not to make up your mind until you have heard all the case.

Jury excused.

Out of the presence of the Jury. [25]

Mr. Gearin: At this time I would like to amend

the Defendant's contentions, adding a couple of subsections to Contention II, adding subparagraph VII, "The Defendant operated said truck at a time when the same was equipped without adequate or proper steering mechanism thereon."

The Court: All right. What is your reason?

Mr. Gearin: That is based on Mr. Embleton's testimony at the last trial.

Mr. Samuels: I object.

The Court: You may amend. Objection overruled. Mr. Samuels, do you have an amendment?

Mr. Samuels: We have two or three amendments we had agreed on. In number one, it has been agreed that Plaintiff's contentions might be amended to include the Plaintiff's list of exhibits to be amended to include the deposition of Dr. Howard Molter and the deposition of Leonard Jacobson. That Contention III may be amended to include the following injuries: a fracture of the right scapula and the phlebothrombosis of the leg. I believe Mr. Gearin and I have agreed on the testimony taken at the first trial, also we have a stipulation as to what the testimony of what Clyde M. Hugel would be. He is with the Interstate Commerce Commission. [26]

Mr. Gearin: Yes, we have a similar stipulation signed already. I would like to state Mr. Samuels and I have agreed that if Mr. Hugel, who is Interstate Commerce Commission Investigator, were here, he would testify as he did in accordance with transcript of the hearing at Eugene to the effect:

(1) That he found the broken pitcock at the point where the truck came to rest.

(2) Mr. Samuels may want to have his testimony regarding the tachograph and the speed.

The Court: Then all of his testimony doesn't go in?

Mr. Gearin: No.

The Court: Now will you state what you are stipulating to?

Mr. Gearin: The parties stipulate that if he were here, he would testify, as a result of his investigation, he found the broken pitcock at the front portion of the truck, where the front portion of the truck was when it came to rest.

The Court: Let's get it on a separate piece of paper and then we will read it to the Jury. Mr. Samuels, have you your changes in the Pretrial Order written out?

Mr. Samuels: I have them on my copy. [27]

The Court: Give them then to Mr. Bishop and he will make the changes.

We will recess now until 1 o'clock.

Noon recess.

Afternoon Session

Mr. Samuels: Call Mrs. Barnhardt.

GUELDA BARNHARDT

thereupon having been produced as a witness in behalf of the plaintiff, having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Samuels): Will you state your name to the Jury please?

(Testimony of Guelda Barnhardt.)

A. Guelda Barnhardt.

Q. Where do you live?

A. At Springfield, Oregon.

Q. What is your occupation?

A. Housewife.

Q. Did you have occasion on the seventeenth day of October, 1950, at shortly after 1 o'clock or thereabouts in the afternoon to be on or near the underpass where this accident happened?

A. I did.

Q. Were you in a car or driving a car at that time? A. I was driving a car.

Q. Was there anybody with you? [28]

A. No, I was alone.

Q. Where were you going?

A. I was going north on highway 99. I was headed to Salem.

Q. You had come from home?

A. No, I had come from work.

Q. Do you recall the weather condition?

A. It was raining, I believe.

Q. Was the pavement wet? A. Yes.

Q. Did you see a Los Angeles - Seattle Motor Express truck coming from the north?

A. Yes.

Q. At the underpass? A. Yes.

Q. Were you moving or stopped at that time?

A. I was moving.

Q. In which direction were you traveling?

A. North.

Q. Had you reached the underpass yet or had you gone through it? A. No.

(Testimony of Guelda Barnhardt.)

Q. You were south of the underpass, then?

A. Yes.

Q. About how far south of that were you when the truck came up to the underpass?

A. I don't remember exactly. I might have been several feet [29] or yards.

Q. Will you give me some estimate?

A. Two or 300 yards, I would say.

Q. Could you say the distance might compare with the length of this courtroom or compare to a block in the city?

A. There wasn't anything blocking my view; there was a Greyhound bus directly in front of me between me and the underpass, and it wouldn't have been any further than this courtroom from me.

Q. Do you think it could have been any further? A. No.

Q. What was in front of you?

A. A Greyhound bus.

Q. Was anything else?

A. I don't remember any cars between me and it and between the Greyhound bus and the underpass.

Q. Could you see north beyond this bus?

A. Not directly in front of it, no.

Q. Could you see toward the right of it?

A. I could see to the left of it. I could see into the underpass, and there was this little red truck.

Q. Could you see the east half of the underpass —I mean the west half? A. Yes.

(Testimony of Guelda Barnhardt.)

Q. Could you see half of the road up there where the southbound traffic would go? [30]

A. I think so.

Q. Will you tell us about what speed in your estimation this truck was coming towards you? I am referring to the Los Angeles-Seattle Motor Express truck, Mrs. Burkhardt.

A. I would say about 25 miles per hour.

Q. Will you tell us what you saw there?

A. Well, I saw this Los Angeles-Seattle transport entering, I also saw the little red truck, which I saw was going into the underpass. I knew they couldn't both pass in the underpass because of the way the little red truck; the position the little red truck was in was what directed my attention to it, and I proceeded to stop.

Q. What happened?

A. About the next thing I saw was the piece of metal flying off the truck.

Q. Did you see the southbound truck collide with the underpass?

A. You mean the Los Angeles-Seattle truck?

Q. Yes.

A. I saw the piece of metal fly off the truck. I knew it had hit it.

Q. From which part of the truck?

A. At the top of the right hand corner of the truck somewhere up there, I didn't examine it closely.

Q. You mean the right hand corner as you face the front of the truck or the way the truck is going? [31]

(Testimony of Guelda Barnhardt.)

A. Well, it was going south. I would have been the right front of the truck.

Q. Its right front then?

A. Yes, on the bed of the trailer of the truck.

Q. Would it be the side of the truck by the edge of the road or the center of the road?

A. By the side of the underpass.

Q. What happened then?

A. I saw it go into the first car there and run into other cars.

Q. Did this truck, the southbound truck, the one that had the metal fly off of it, go straight or turn—what happened after it hit the underpass?

A. It went to the right some, although I wondered if it would come across the highway, but it kept to the right until it hit the first car and then some more.

Q. What happened to the first car?

A. Well, it just pushed it on into the other cars.

Q. Where did this car stop?

A. It was off the highway—I don't know. It was parked quite a few feet off the highway.

Q. It was completely stopped off the roadway?

A. Yes.

Q. Where was it parked, if you know? Where was it parked with relation to that roadway that comes in there from the west?

A. I don't remember exactly, although it seems to me it wasn't [32] too far from the underpass where it was parked.

Q. Is that the car that contained Mrs. Raish?

A. Yes.

(Testimony of Guelda Barnhardt.)

Q. This little pickup that you talked about, what did it do?

A. That was the last that I saw of it. After it was in the underpass and caused the large truck to hit the underpass and have metal fly off of it, I didn't see any more of the little red truck.

Q. It didn't stop? A. No.

Q. Did you see the southbound truck, the Los Angeles-Seattle Motor Express truck when it hit the Raish car, did it climb up on the Raish car?

A. I don't know.

Q. You don't know that? A. No.

Q. You mentioned that you were in some fear that the truck would come over to your side of the road. Did it start to turn towards your car?

A. No, but it happens so frequently when things like that happen, things go through your mind. I guess I didn't know what was going to happen. I knew something would happen, and I applied my brakes to stop.

Q. You were stopped when you saw most of this? A. Yes. [33]

Mr. Samuels: You may cross examine.

Cross Examination

Q. (By Mr. Gearin): Mrs. Barnhardt, you have been requested to come to this trial on behalf of the Southern Pacific Company, too, haven't you?

A. Yes.

Q. When you saw the little red truck going into the underpass you knew at that time that something was going to happen, didn't you?

(Testimony of Guelda Barnhardt.)

A. That is right.

Q. And you could see part of the little red truck? A. Yes.

Q. And that was straddled over the center line, wasn't it? A. Yes.

Q. And you knew at that time there wasn't room between the front of the red truck and the side of the underpass for the Los Angeles-Seattle truck, didn't you? A. That is right.

Q. After the Los Angeles-Seattle truck collided with the underpass and you saw this aluminum metal or whatever it is, fly off, it continued directly to its right and to the Raish car and then on the other cars, didn't it? A. Yes.

Q. Did you notice that the speed decreased any when you watched [34] it?

A. I never particularly noticed that. He didn't have any control or couldn't have had much anyway.

Q. You have been on the highway and see these large trucks, haven't you? A. Yes.

Q. And vehicles with air brakes on them, haven't you? A. Yes.

Q. You are familiar with the hissing sound made when air brakes on the large trucks are applied? A. Yes.

Q. Did you hear that or any sound of that sort at that time? A. No, I didn't.

Mr. Gearin: That is all.

Redirect Examination

Q. (By Mr. Samuels): Was the window in your car open or closed?

(Testimony of Guelda Barnhardt.)

A. I couldn't tell you that, I don't remember.

Q. It has been quite awhile since this accident, hasn't it? A. Yes.

Mr. Samuels: Nothing further.

Mr. Gearin: Nothing further.

The Court: Witness excused.

Witness excused. [35]

Mr. Samuels: Call Mr. Stone.

O. L. STONE

thereupon being produced as a witness in behalf of the Plaintiff, having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Samuels): Will you state your name to the Jury, please? A. O. L. Stone.

Q. Where do you live, Mr. Stone?

A. At Eugene, Oregon.

Q. How long have you lived there?

A. Fifteen years.

Q. What is your age?

A. 58 years of age.

Q. And your occupation?

A. I am a bus driver for Greyhound.

Q. How long have you driven busses?

A. Since 1928.

Q. Has that been continuously?

A. Yes sir.

Q. Has that driving been both city driving and out in the country throughout this vicinity?

A. Yes, that is right. [36]

(Testimony of O. L. Stone.)

Q. Did you have occasion to be near the scene of this accident that we are talking about here?

A. I was there, yes.

Q. Do you recall the weather conditions on the day of this accident? A. It was raining.

Q. About what time of the day did the accident happen, if you remember?

A. Approximately at 1:30.

Q. In the afternoon?

A. Yes, in the p.m.

Q. Where were you going at that time?

A. Eugene was my destination.

Q. You had been driving from where?

A. From Medford.

Q. When the accident happened, where were you located?

A. Off the right shoulder of the paved portion of the road, northbound.

Q. That would be on highway 99?

A. Yes.

Q. Where were you with respect to this underpass that we are talking about?

A. Approximately 150 feet south of it.

Q. You had been going north, is that correct?

A. Yes. [37]

Q. Did I ask you as to the weather conditions?

A. Yes sir.

Q. Did you see a Los Angeles-Seattle truck southbound before it reached the underpass?

A. Not before it reached the underpass.

Q. When did you first see the truck?

(Testimony of O. L. Stone.)

A. When it started to go through the underpass.

Q. At that time were you moving or were you stopped? A. I was moving.

Q. How fast were you going?

A. Approximately 25 miles per hour.

Q. Do you have any estimate as to the speed, the miles per hour, of the Los Angeles-Seattle truck driver?

A. I would say his speed was about 25 miles per hour.

Q. About 25 miles per hour? A. Yes sir.

Q. What happened then?

A. Well, as he came through the underpass, the upper right hand corner of his truck caught on something on the underpass as he came through.

Q. Did you see a red truck there northbound?

A. I didn't.

Q. So there isn't any question in the Jury's mind, by the upper right hand corner of the truck coming toward you, would it be on the left or the right? [38]

A. It would be on my left, his right.

Q. Going south, it would be on the side where the edge of the pavement was on his side of the road? A. That is right.

Q. Do you know what part of the truck came into collision with?

A. A diagonal piece of the brace under the underpass.

Q. Was that brace on the north or south side of the underpass? A. The south side.

(Testimony of O. L. Stone.)

Q. Did some of the metal stick to that brace of the underpass?

A. I didn't know it at the time. I saw it afterwards.

Q. Is that what is shown in one of the pictures we have here? A. It is.

Q. Will you tell the Jury as to whether or not when the truck came through there, as part of the truck struck the underpass, which part of the truck came into collision with the brace?

A. I don't believe I understand the question.

Q. Well, the part that came into collision with the brace that is located about how far back from the front bumper of the truck, if you know?

A. Well, it must be 6 or 8 feet.

Q. And the part ahead of that, the body came through without having any trouble?

A. It did.

Q. There was no collision before it hit the upper crossbeam of the underpass?

A. I didn't see any. [39]

Q. What happened then after the accident?

A. It tipped over to the left and after that I don't know what happened until it came to rest.

Q. Did you follow the course of it with your eyes? A. No.

Q. What were you doing at that time?

A. Getting the bus in the clear and stopped at the side of the road.

Q. What was the next thing that you saw?

A. After I got stopped, I looked over and the truck had come to rest.

(Testimony of O. L. Stone.)

Q. Will you describe where it was in relation to the other cars and with respect to the underpass?

A. Well, it was around 50 to 60 feet, maybe 100 feet beyond the underpass off the side of the road and on top of a car. This car was folded there under it.

Q. Were there other cars there ahead of it then?

A. Yes.

Q. Do you know whether or not the southbound truck went on top of this car before it reached the place where it had stopped?

A. No, I wouldn't know that, no.

Q. Where was this car containing Mrs. Raish stopped?

A. You want that before the collision or afterwards?

Q. Before the collision?

A. I didn't see it before the collision. [40]

Q. Did you see any other vehicle in the underpass when the southbound truck went through?

A. No, I didn't.

Q. Were you hesitating or did you slow down or stop to let the other truck go ahead of you?

A. I had slowed down.

Q. For what reason?

A. I don't like to pass in that underpass with another vehicle.

Q. What was the reason? Ordinarily busses pass there all right, don't they? A. Yes.

Q. Why didn't you want to pass him in there?

Mr. Gearin: We object to that, Your Honor. He said he didn't pass them because he didn't want to.

(Testimony of O. L. Stone.)

The Court: Objection sustained.

Mr. Samuels: Nothing further.

Cross Examination

Q. (By Mr. Gearin): Mr. Stone, you heard the police officer testify this morning concerning his measurements, didn't you? A. Yes sir.

Q. And I believe he stated that he measured the distance from the south part of the underpass to where the rear axle of the [41] truck was—that distance was 177 feet 4 inches, and that from the front part of the truck to the underpass was a distance of 215 feet—when you say the truck was about 100 feet from the underpass, you didn't measure that, did you? A. I didn't, no.

Q. You would say that would be more or less a guess? A. Yes, strictly.

Q. You have been driving highway equipment for a long time?

A. Yes, it has been a long time.

Q. As a Greyhound Bus driver you have had to pass a physical examination, including an examination of your eyes, haven't you?

A. Yes sir.

Q. And you are trained as a lot of drivers are, aren't you? A. Yes.

Q. It is your duty to keep a close lookout for the traffic ahead of you, isn't it? A. Yes.

Q. And I assume you were keeping such a lookout as you approached this underpass, weren't you?

A. I was.

(Testimony of O. L. Stone.)

Q. And there was no cause in your mind for this accident, after all there was no little red truck there; you observed none, did you?

A. I didn't see any. [42]

Mr. Gearin: That is all.

Redirect Examination

Q. (By Mr. Samuels): As this southbound truck came towards you, could you tell whether or not its right wheels were on the shoulder or on the pavement edge?

A. I wasn't watching that part of it.

Mr. Samuels: That is all.

Mr. Gearin: That is all.

The Court: Witness excused.

Witness excused.

Mr. Samuels: Call Mr. Thomas Embleton.

THOMAS IVISIN EMBLETON

thereupon being produced as a witness in behalf of the plaintiff, having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Samuels): Will you state your name, please? A. Thomas Ivisin Embleton.

Q. Where do you live?

A. Oak Arbor, Washington.

Q. And your age? A. I am 40. [43]

Q. Are you married? A. Yes sir.

Q. What is your occupation?

(Testimony of Thomas Ivisin Embleton.)

A. Truck driver.

Q. By whom are you employed?

A. By the Los Angeles-Seattle Motor Express Truck Company.

Q. How long have you been driving a truck?

A. Approximately 20 years.

Q. Have you worked for other companies besides this one? A. I have.

Q. Has your experience been with every type of truck equipment, heavy and light equipment?

A. All heavy trucks and busses.

Q. Has that been continuous for the past 20 years? A. Yes.

Q. On the day of this accident, Mr. Embleton, where was the place from where you left?

A. Seattle, Washington.

Q. And where were you bound for?

A. We were bound for San Francisco.

Q. You say, "we", was there somebody else with you?

A. There are two drivers on all our trucks. The other driver was driving when we left Seattle.

Q. At the time of the accident, where was he?

A. He was in the sleeper.

Q. Where is that on the truck? [44]

A. That is located right behind the cab in the bed of the truck.

Q. The relief driver was sleeping during the time the truck was moving?

A. Yes, we worked an eight hour shift.

Q. You left Seattle that day about what time?

(Testimony of Thomas Ivisin Embleton.)

A. Approximately 4 o'clock in the morning.

Q. And who was driving at that time?

A. The other driver, M. E. Palmer, Melford E. Palmer.

Q. How far did he drive that day?

A. To Woodland, Washington.

Q. Did you stop there?

A. Yes, he stopped and woke me up.

Q. Did you take over from that place?

A. Yes, I did.

Q. And you drove to the place where this accident happened? A. Yes.

Q. Was it necessary to apply brakes to your truck numerous times?

A. Numerous times, yes.

Q. Were there any holes in your brake linings then?

A. I didn't know of anything; they worked all right.

Q. Did you bring the truck to a stop at the Springfield Junction which is just a few hundred feet on east from where the accident happened?

A. I observed the braking equipment two or three times as there [45] are four or five stoplights at the junctions all along coming through Eugene.

Q. Did you have any trouble with your braking equipment then? A. No.

Q. Any trouble with your starting equipment?

A. No.

Q. Did you make a stop at Woodland, Washington, where you had your transmission lever fixed? A. Yes.

(Testimony of Thomas Ivisin Embleton.)

Q. Would that have anything to do with the starting equipment or the braking equipment?

A. That would have nothing to do with the starting or braking equipment.

Q. What were the weather conditions at the time of the accident?

A. It would rain intermittently; stop for a few minutes, then rain, then stop, then rain again.

Q. Will you tell the Jury how the braking systems on truck work when it is raining—I am referring to the application of the brake linings to the brake drums?

A. Well, the brakes on a truck are not exactly like the brakes on an automobile. Your drum on an automobile is entirely closed, but the truck brake, as I said before, the shoes—we have 4 inch shoes in back, that is a shoe that is 4 inches wide, and they are about a 14 or 16 inch brake cylinder. On the big trailers, it is 18 to 20 inches. Of course, when the brakes are not applied for [46] some time, it works like a car when the shoe hits the drum and when we release it, the brake comes free.

Q. Isn't it a fact that water gets into the brakes, making the efficiency of them vary?

A. It makes some difference in due course of time, if you travel quite a distance without applying the brakes, the revolution of your axle has the tendency to pick up water, as everyone knows. When you see a truck or car, you can notice the tires slapping on the pavement pick up water. That is also true of the truck, and water gets in behind

(Testimony of Thomas Ivisin Embleton.)

there and naturally this water, grit, sand, and what have you gets on the brake drums and without any use of the brake drums or any use of the air against the brake drum for quite a little while, will have the tendency to open up the line somewhat, and after that you cannot expect to get the proper braking efficiency when your brakes have to be applied. Sometimes the lines dries up on you.

Q. Is that something every driver of a truck is faced with—the brakes on every truck are fixed like that? A. Yes.

Q. Is that standard operating equipment?

A. Yes.

Q. Just prior to the time of this accident, approximately how long was it before that you had used your brakes?

A. It was just around the corner, a few hundred feet from where the accident happened. I had to stop for a red light. [47]

Q. Did they work then all right? A. Yes.

Q. Going back to the approach where this accident happened, is it a straight or crooked highway as you approach this underpass?

A. It is straight for about 800 feet.

Q. What did you say, is it about 800 feet beyond the underpass that it is straight? A. Yes.

Q. Is that where you made your last stop?

A. Yes.

Q. How fast as to speed were you driving?

A. Approximately 30 miles per hour.

Q. What was the weight of your vehicle loaded?

A. As near as I can tell, 72,000 pounds.

(Testimony of Thomas Ivisin Embleton.)

Q. Is that normal weight.

A. That was at that time, the total weight by law. Of course, it is 76,000 now.

Q. Will you tell us what happened?

A. Well, just as I was entering the underpass, I noticed this red truck that had already started to enter the underpass going the other way. As I started through, I noticed he was quite aways over in my lane, and I said to myself, he is not giving me much room. So I swerved over to my right to avoid a collision and just about that time there was a crunch.

Q. What was that crunch, did you find out later? [48]

A. Well, at that time, I didn't have any way of knowing.

Q. What was it that you found out later?

A. It was the right top part of the truck body that had collided with the beam on the underpass.

Q. One of the crossbeams or one going up and down? A. It was the angling beam.

Q. What was the height of your truck?

A. About 12 feet 3 inches.

Q. And the width? A. 8 feet.

Q. Now have you gone through that underpass before with other trucks being in there?

A. On numerous times.

Q. Are you able to go through there without reducing speed?

A. Well, you can't go through there 50 miles per hour, but a person can go through there using due caution.

(Testimony of Thomas Ivisin Embleton.)

Q. About how much space is there between the trucks if there are two trucks of the size of the one you were driving going through there?

A. Oh, about 4 inches.

Q. Four inches to spare? A. Yes.

Q. As you mentioned, you swerved over and then there was a crunch—about how far over do you think you swerved?

A. About 14 or 16 inches. [49]

Q. Were you about that far from the yellow center line? A. Yes.

Q. And did any part of your vehicle come out without having a collision with the crossbeam?

A. Come again?

Q. The part of the truck that came in collision with the crossbeam, is that part way back on the truck bed?

A. It is located about 5 feet back from the very front of the vehicle.

Q. Did the truck part of the car come through without any collision? A. It did.

Q. Did it strike any portion of the bridge construction? A. No.

Q. Was there any collision with anything except the right upper corner of the truck?

A. There wasn't indication of it.

Q. What was the construction of the framework of that body—I am calling your attention to the part where the aluminum paint was?

A. The body itself was made of manganese

(Testimony of Thomas Ivisin Embleton.)

aluminum. That is a very light aluminum alloy mixed with manganese for strength.

Q. Referring to the covering or skin, that is aluminum, isn't it?

A. Yes, it is about 3/8" thick and would take quite a bump to [50] do any damage to that.

Q. Is that fixed to any part of the framework of the truck body?

A. It is riveted to the framework of the truck body.

Q. On the framework on the inside of it?

A. Yes.

Q. When this crunch happened, when the upper right part of the truck collided with the crossbeam, what happened to the truck?

A. Well, it lurched to the left.

Q. Then what happened, then what did you do?

A. Well, it lurched off to the other side, it lurched to the left toward the oncoming traffic which were a car and a Greyhound Bus and some other traffic on behind, and I didn't want to hit that bus so I pulled the wheel around hard to the right and as a brought it around to the right, I noticed that there was a light tan automobile sitting there right off the edge of the road. I started to turn the steering wheel to avoid a collision with that car—I didn't have time and I saw then that I was going to hit the car and I said to myself, "I hope there isn't anybody in that car." Of course, it came up to the back end of this car and in the meantime I was still trying to bring the truck back up on the highway. Well, nothing happened, the impact of

(Testimony of Thomas Ivisin Embleton.)

the car impaired the steering mechanism so I couldn't get it to work, and in the meantime, I thought it was funny that I wasn't slowing down at all. Later I found that [51] during the course of the time this was happening, the pitcock on the airbrakes had gotten knocked off and I had no brakes.

Q. Where was this pitcock located?

A. Well, as Mr. Hugel told me—he is the commissioner——

Q. No, I am referring to where it is located on the truck?

A. It is located on the bottom of the air tank, that is the storage tank for the purpose of working the braking system, just forward of the rear wheels on the truck. That would be on my right hand side.

Q. What is its function?

A. You mean the tank?

Q. Yes.

A. It is storage for air for application to the brakes.

Q. Suppose the pitcock is knocked off that type of tank, what is the result on the braking system?

Mr. Gearin: We object to that, Your Honor, unless there is some previous testimony that it was broken off. If Mr. Samuels intends to tie it up to something like that, I don't care about it.

Mr. Samuels: I think he testified that it was knocked off, unless I misunderstood him.

Mr. Gearin: I may be mistaken on that, Your Honor.

(Testimony of Thomas Ivisin Embleton.)

Mr. Samuels: He testified that it was knocked off, as I understand it from his previous [52] statement that the pitcock was found near the place where the truck finally came to rest.

Mr. Gearin: That is my understanding of the situation. I withdraw my objection.

A. (By Mr. Samuels): What was the question?

Q. The question was—if the pitcock was knocked off on that type of braking equipment, what was the result from the efficiency of the brakes?

A. You would have no brakes.

Q. They would not hold? A. No.

Q. Could you clarify that to the Jury. Tell the Jury what that tank does back there?

A. To the best of my ability—of course, I will have to start at the very beginning. For this purpose there is mounted on the front end of the truck, what we call an air compressor, the same nature as the kind you find in service stations for pumping up the tires. This compressor is of that type. There is a line that runs back to a tank on the left side of the truck, what we call a wet tank. The purpose of that tank is to take out all the impurities that is thrown into the compressor out of the air before it is put into the storage tank. And of course, from that wet tank the air goes through another line into the storage tank where it is stored until an application of the [53] brake is required.

Q. If you lose pressure on your system, will the brakes apply? A. No.

Q. Had you applied the brakes and attempted to stop the vehicle shortly before the accident?

(Testimony of Thomas Ivisin Embleton.)

A. Yes. ?

Q. After the collision with the underpass?

A. Yes.

Q. Did they work?

A. That I couldn't say, I was wondering why I wasn't stopping any or slowing down.

Q. Did you apply them before the collision with the car containing Mrs. Raish?

A. Yes, I did, just prior to entering the underpass a little.

Q. I mean after you had hit the underpass before you hit her car? Had you applied your brakes then?

A. I had my foot on the brakes all that time.

Q. At the same time as you were trying to regain control of your vehicle? A. Yes.

Q. And they worked all right just before you went through the underpass, didn't they?

A. They did.

Mr. Samuels: May I see those photographs?

Q. I am handing you Plaintiff's Exhibit No. 4-A and 4-B and call [54] your attention to the crossbeam there, and I will ask you if you know what that piece of metal is that is on the crossbeam up against there?

A. Well, this is Exhibit No. 4-B, and that is a piece of metal that is hanging on that little ladder —that is the strip that I had left there, that is the strip off my truck bed.

Q. That came off your truck?

A. It is the same.

(Testimony of Thomas Ivisin Embleton.)

Q. Is that the crossbeam you refer to as causing the collision with your vehicle?

A. It is.

Q. I will hand you Exhibit No. 4-K, and ask you if that is a correct picture of the truck as it was following the accident? A. Yes, it is.

Mr. Samuels: No further questions.

Cross Examination

Q. (By Mr. Gearin): Mr. Embleton, how long did you stop at Woodland, Washington, to have your truck fixed?

A. Well, in the neighborhood of 45 minutes, I would say.

Q. Had you made up that time by the time you got to Eugene? A. Pardon me?

Q. Had you made up that time?

A. Implying what?

Q. I will ask another question—were you behind time as you got [55] to Eugene.

A. We don't have any set schedule. I don't operate on a bus schedule.

Q. In other words your employer doesn't care when you get to San Francisco, is that right?

A. No, it doesn't really make too much difference, a matter of a few hours. If we are way off on the way, we usually send them a wire informing them the approximate time we will arrive there.

Q. Then it isn't a fact that you were trying to make up lost time as you were going down the Willamette Valley, is it? A. No.

Q. Your brake drums are open, aren't they?

(Testimony of Thomas Ivisin Embleton.)

A. Yes.

Q. Do you know any reason why a big brake drum can't be enclosed like it is on a passenger car?

A. No.

Q. As you went along there, when was the last time you put your foot on the brakes, was it within 100 feet of the underpass or when the red truck appeared did you put your foot on the brakes then?

A. I wouldn't say 100 feet away.

Q. A thousand feet away?

A. I wouldn't say that.

Q. When you stopped up at the "Y", were your brakes working all right? [56] A. Yes.

Q. You stopped up at the "Y"? A. I did.

Q. By going this 800 or 1000 feet without putting your feet on the brakes, would that make enough water so that the brakes wouldn't hold?

A. I just got through stating that I had the brakes down a little just before entering the underpass.

Q. How fast were you going before you braked it down?

A. I wasn't watching the speedometer. I was watching the road.

Q. You have driven trucks for a good many years? A. Yes.

Q. You can drive and know how fast you were going without watching the speedometer, can't you?

A. Approximately.

Q. Approximately how fast were you going before you braked it down and before you went under the underpass?

(Testimony of Thomas Ivisin Embleton.)

A. Approximately 30 miles per hour.

Q. After you braked it down, how fast did you go then? A. I didn't notice.

Q. What were you paying attention to?

A. I was watching the underpass.

Q. And there was nothing in the underpass?

A. Well, at the time after I hit the brakes, there was this little red truck. [57]

Q. I see, and that is more or less level under the underpass—the pavement is more or less level there? A. More or less.

Q. When you are north of the underpass 200 or 300 feet, can you see under the underpass and see the highway beyond for 200 or 300 feet—can you see the highway beyond. There are no side roads to your left from the east on the other side of the underpass there, are there, but there is one to the right where Mrs. Raish was, isn't there?

A. Yes.

Q. There is none to the east, is there?

A. No, but there are some business houses out there where a lot of cars go in and out.

Q. You could see as you approached the underpass, you could see the bus stopped there on the other side, couldn't you?

A. I noticed the bus and a few cars on the other side, yes.

Q. You were keeping a lookout ahead of you?

A. Yes.

Q. All your concentration was centered on the lookout ahead of you? A. Yes.

(Testimony of Thomas Ivisin Embleton.)

Q. Can you tell the Jury where the red truck came from? A. No, I can't.

Q. The first time you saw the red truck was when you were entering the underpass from one side and he was entering the underpass [58] from the other side? A. That is correct.

Q. As shown in one of the pictures there, Mr. Embleton, the part of the truck that was torn off was just a thin piece of metal that was torn off on the right hand corner, just the skin of the truck, is that right?

A. It wasn't the skin; it was a piece of metal about 3/8" thick. As you can tell, it is separate there; it is reeinforced there for the corner, and it is a separate part of the top. That is what is ripped away, the upper part of the body.

Q. Did you see that piece yourself?

A. Later on, I saw it myself.

Q. When was this?

A. Well, I walked back—I looked at it when it was sent to Cummings Truck Service down there at Eugene.

Q. You say the impact of your truck and the underpass lurched you to the left toward the center lane? Did you lurch toward the center line?

A. It did.

Q. You didn't cross the center line?

A. I was too busy, I didn't notice, but I didn't go very far over there.

Q. You were able to turn the truck all right?

A. Yes, I did.

(Testimony of Thomas Ivisin Embleton.)

Q. Will you tell the Jury why you couldn't turn to the left again when you knew you were going to hit Mrs. Raish's car? [59]

A. As far as I know, I would say my steering mechanism was impaired.

Q. That is the best of your recollection?

A. Yes.

Q. That is your testimony? A. Yes.

Q. Since the last hearing in this case on January 23 and 24 of this year, Mr. Embleton, have you discussed the matter of your testimony with anybody representing your employer, the Los Angeles-Seattle Motor Express Company, Inc.?

A. I discussed some with Mr. Samuels and Mr. Vergeers.

Q. Did you go over your transcript of your testimony from that trial? A. Just slightly.

Q. You live up at Island County, Washington?

A. Yes.

Q. Now when you saw the red truck, you immediately put on your brakes?

A. Well, no, I said I put on my brakes just before we got into the underpass.

Q. Was that before or after you saw the red truck? A. It was about simultaneously.

Q. Did you keep your foot on the brakes all the time thereafter?

A. Well, about the same time that I put my foot on the brakes the accident occurred. [60]

Q. Well, now, had the accident occurred when the front of your truck was about 5 feet out of the underpass, had it?

(Testimony of Thomas Ivisin Embleton.)

A. You are not taking into consideration the reaction and whatnots.

Q. What are the "whatnots" that I am not taking into consideration?

A. Well, from the first time that you step on this brake pedal to—the air gets picked up through the diameters, or whatever you call it, to make the brakes contact with the brake drums.

Q. You misunderstood my question then Mr. Embleton. Did you see the red truck before you got to the underpass?

A. No, about halfway between the curve and the underpass I met a big truck with a low bed on it and a caterpillar tractor on it, then I slowed down and I saw this other traffic which I thought was stopped. I slowed down, it was going so slow. I waited for the truck with the 10 inch blade to come through the underpass, but I didn't notice this other truck until I got up right to it and started through the underpass. Then I saw this red truck; It just seemed to come from nowhere.

Q. Is it a fair statement that you were just entering the underpass when you saw the red truck, or did it happen so quickly you don't remember?

A. Well, I wasn't more than 20 or 30 feet through it.

Q. Well, you said that you applied your brakes about the same time as you saw the red truck, isn't that correct? [61]

A. Yes, that is correct.

Q. Did you keep your foot on the brakes till afterwards and didn't let up the brakes at all?

(Testimony of Thomas Ivisin Embleton.)

A. No, to my knowledge I was pretty busy.

Q. You didn't put your foot on the gas?

A. No.

Q. Do you recall your deposition taken at the Island County Courthouse at Coupeville, Washington, on January 10 of this year?

A. I recall I gave one, yes.

Mr. Gearin: I wonder if the original deposition could be handed to the witness.

(The original deposition was then handed to the witness.)

Q. I will refer, Mr. Embleton, to page 36 of your deposition, the second question on that page beginning at line 9, and I will ask you if you did not give these answers to these questions:

"Q. When did you first apply your brakes?

"A. Well, as soon as the impact took place.

"Q. Did you apply your brakes at all when you first saw this red truck?

"A. A little before, and then I left my foot off the brake a little, and eased over, and kind of stepped on the throttle a little, you see, to give me momentum, and then I heard this awful crunch, and of course [62] the truck lurched, and I jammed on the brakes when I started shooting out, you know, in the other lane of traffic.

"Q. Did you feel your truck skid when you jammed on the brakes?

"No. Things were happening too fast. I would not say—I didn't have time to do any feeling."

(Testimony of Thomas Ivisin Embleton.)

Q. That was your testimony taken on January 10 of this year?

A. I did give that testimony.

Q. What is the fact, Mr. Embleton, as to when you first applied your brakes—was it before or after you saw the red truck?

A. Well, I applied them several times previously, but just what are you trying to get at?

Q. Well, I am asking you with reference to the time that you saw the red truck. Did you put your brakes on before that time or after that time?

A. I put them on just before entering the underpass.

Q. When you put your foot on the throttle——

Mr. Gearin: I wouldn't bother about reading that deposition, Mr. Embleton. I just want your best recollection at this time.

The Witness: I wasn't reading it; I was just trying to picture it.

Mr. Gearin: The only thing we want is your best recollection now. [63]

The Witness: I was just trying to picture the happening down there.

Q. Let me ask you another question then. As far as you now know and remember, Mr. Embleton, about the time you went under the underpass, you had put your brakes on—is that a fair statement of the fact?

A. That is a fair statement, yes.

Q. And at that time the brakes would not work?

A. They did work.

(Testimony of Thomas Ivisin Embleton.)

Q. When?

A. Before I went into the underpass.

Q. Before you went into the underpass?

A. Yes.

Q. When didn't they work?

A. Well, I said, I wondered why they were not working after the accident occurred.

Q. Now, do you recall your testimony given in this court on January 23 of this year—page 32—the question is,

"Q. As far as you remember when you went into the underpass you put on your brakes, didn't you? "A. Yes.

"Q. At that time the brakes did not work, did they?

"A. It would be pretty hard to say whether they worked or not, right this minute."

Q. (Continued) This was your testimony in this courtroom at [64] that time? You gave that testimony, didn't you? A. Yes, I did.

Mr. Samuels: That isn't complete, you should go into the next question or two, Mr. Gearin.

Mr. Gearin. All right.

Q. Then there were these questions and answers:

"Q. Do you have airbrakes on the 20 wheels of your truck? "A. Yes sir.

"Q. Each one of the 20 tires? "A. Yes.

"Q. Each one of the tires is 8 inches wide on the pavement, is it not?

"A. I never measured it.

"Q. But it is approximately that?

(Testimony of Thomas Ivisin Embleton.)

"A. I would say that."

Q. (Continued) You gave those answers in response to those questions in this courtroom at that time? A. Yes.

Q. Of course, it takes sometimes for the air to reach—to go through the air lines, after you put your brakes on, doesn't it? A. Yes, it does.

Q. What was the speed of your truck as you were going under the underpass?

A. That I wouldn't say. [65]

Q. Do you recall your discussion with Officer Hulett? A. I recall talking to him.

Q. Do you recall telling him that your speed was between 30 and 35 miles per hour?

A. That was prior to the time I reached the underpass. I also told him I was sure that my speed was between 30 and 35.

Q. You are not sure now of your speed, are you?

A. Well, now later the tachograph indicated my highest speed was 28 miles per hour. That could have happened when the truck hit the underpass and the rear wheels were off the ground.

Q. Do you know that the rear wheels were raised off the ground? A. Yes, sure.

Q. You could feel that? A. Yes.

Q. I don't want to appear to be badgering you, but could you tell the Jury whether or not you did have your brakes applied before you struck the underpass—what can you say about that?

A. I have already told you once—I let my foot

(Testimony of Thomas Ivisin Embleton.)

off the brakes and stepped on the throttle again. We have a series of gears, at that time I wasn't in the first gear. You have to understand that. I think I was about third over maximum speed, and if you crowd it, and I mean crowd it, you might be able to possibly make it do 35 miles per hour, possibly that is.

Q. Mr. Embleton, after you had struck the underpass, you then put on your brake? [66]

A. I did.

Q. After that time, or at any time thereafter, did your truck slow down or respond to your brakes?

A. Well, I was wondering why I wasn't slowing down faster than I did, yes.

Q. Your brake drums had water on them as you went under the underpass?

A. I don't know, but I didn't see, like I said, why I didn't slow down. As I said at the previous hearing, there is always a possibility.

Q. Referring to your testimony on page 36, the first question on that page:

"Q. Is it your testimony that your brake drums had water in them as you went under the overpass?

"A. They did."

Q. Is that what your testimony is now?

A. They did, they would have to have some water in them.

Q. Now are you sure that your truck did not hold 73,193 pounds gross weight at that time?

(Testimony of Thomas Ivisin Embleton.)

A. I don't know; I didn't notice.

Q. Now this was about your fifth trip under this underpass for this particular rig, wasn't it?

A. It was.

Q. For how long had you driven this type of equipment under this underpass? [67]

A. This type of equipment was new, fairly new; the company was changing from what it did have, the regular conventional trucks. They were buying up these new ones.

Q. This particular type built truck was called a cab-over? A. Yes.

Q. You had driven this rig about five times?

A. Correct.

Q. You had never had any difficulty before?

A. No, never before.

Q. You have driven this route up and down the coast for a good many years, haven't you?

A. Yes.

Q. You have driven higher rigs under this underpass, haven't you? A. Yes.

Q. How did you manage with them?

A. Well, you have to slow down and go very slowly to get through with a higher rig. You have to go very slowly.

Q. All the trucks that are the same general height as the one you were driving—you had been able to go through with them under the underpass with the same speed before, hadn't you?

(Testimony of Thomas Ivisin Embleton.)

A. I had.

Q. This red truck was about a foot over the yellow line, was it not?

A. As near as I can remember, yes. [68]

Q. Do you remember making a statement to—Mr. Jack Spencer, the Deputy District Attorney for Lane County, right after the accident?

A. Yes.

Q. I will ask you, if at that time, you didn't answer a question given to you. I am referring to Defendant's Pre-Trial Exhibit No. 61,—if he didn't ask you this question?

"Q. Do you mean by that he was driving in your lane of traffic? Or over the yellow line?

"A. I do not believe there is a yellow line. He was driving just over too far, I would say practically straddling the center of the road. I was just in the act of stepping on the brake; I eased it over, stepped on the brake and about that time the truck came up toward the side, and I heard a bump."

Q. Did you make that statement to Mr. Spencer?

A. I did.

Q. To refresh your memory isn't it a fact that the red truck was just about straddling the center of the highway, as you can now best remember—that is a fair statement, isn't it?

A. Well, it was, to the best of my knowledge and recollection. He was over in my lane of traffic.

Q. Whether or not he was a foot or straddling the center of the road, you don't remember now, do you?

A. I wouldn't say a foot or 14 inches or 16

(Testimony of Thomas Ivisin Embleton.)

Q. You don't remember it in feet now, do you?

A. Pardon me.

Q. I was going to say you don't remember now whether he was even with the center line or far over it or straddled the center line, do you?

A. What do you mean by straddled, going down the center of the highway?

Q. Yes. A. No, he wasn't.

Q. Do you have a speedometer in your truck—you do, don't you? A. Yes.

Q. Now, I think you have stated it before, Mr. Embleton, that there is ample room in the underpass if both vehicles will keep on their own side of the center of the underpass, isn't that right?

A. I said there is room to go in there, yes.

Q. There is room to get by? A. Yes.

Q. You have passed trucks under the underpass before, haven't you? A. Yes.

Q. To get back to the red truck, if the red truck hadn't crowded you over there, there wouldn't have been an accident, would there?

A. Well, hardly. [70]

Q. You don't believe so?

A. I don't believe so.

Q. You don't know when this pitcock broke off, do you? A. No.

Q. It could have been broken off when the cars came to rest at the telephone pole in front of the autowreckers, couldn't it?

A. No, I hardly think so, because it was found 12 or 14 feet behind, if I remember correctly.

(Testimony of Thomas Ivisin Embleton.)

Q. Did you see it there?

A. No, Mr. Hugel of the I.C.C. picked it up.

Q. That is what he told you? A. Yes.

Mr. Gearin: I move to strike the testimony of the witness as to the information he received from someone else and ask the Jury to be instructed to disregard it.

The Court: That is right.

Ladies and Gentlemen of the Jury, with reference to any testimony about his statement as to the pitcock being 12 or 14 feet behind where the truck came to rest, you are instructed to disregard that testimony.

Q. (By Mr. Gearin): You don't know exactly where the truck was when the brakes went out, do you? [71] A. No, I don't.

Q. You had some trouble with the steering of your truck, as I understand it?

A. Well, after the impact, yes.

Q. The only part of your truck that came into contact with the underpass was the upper right corner wasn't it? A. Yes.

Q. Could your steering difficulty be caused by the wet pavement or gravel on the road, rather than something wrong with the steering mechanism?

A. No.

Q. Getting back to your testimony of January 23, I will ask you if you didn't make these answers to these questions:

This is on page 44 of the transcript:

(Testimony of Thomas Ivisin Embleton.)

"Q. Did you attempt to avoid the collision by going to the left?

"A. I did, but it didn't do any good.

"Q. Why?

"A. Something was wrong with my truck.

"Q. Something was wrong with your truck?

"A. The wheels couldn't turn. This could have been due to a wet pan or a little bit of gravel on the drum or something wrong with the steering mechanism."

Q. Did you give us that testimony then?

A. Well, it is all right, down to a certain part. I don't recall [72] anything about a wet pan on the truck. I don't know what that would have to do with the wheels.

Q. You don't recall that testimony then?

A. No, as far as the pan, I don't know where a pan would fit in. Someone has just misconstrued what I said.

Q. Can you give us any explanation now of why your truck would not respond when you tried to turn it to the left? A. No, I can't.

Mr. Gearin: Now, that is all.

The Court: Looking at this answer to this question in the transcript of the former trial, I think the word should be pavement instead of pan. It was due to wet pavement, not a wet pan.

Mr. Gearin: I was in doubt about it myself, so I didn't pursue it any further. I knew the word pan didn't fit in. It was wet pavement, that should be the correct word there.

(Testimony of Thomas Ivisin Embleton.)

Redirect Examination

Q. (By Mr. Samuels): Did your truck come into contact with this red truck?

A. No, it didn't.

Q. Mr. Embleton, are there very many trucks similar to the kind you were driving on the highways, using this highway?

A. Oh, I would say they run into the thousands.

Q. Do you know if there are trucks in Oregon comparable with that one that go through there?

A. Yes.

Q. Was there anything unusual about the one that you were driving.

A. Not particularly.

Q. Was there anything unusual about it as to its size?

A. No, nothing unusual. It was 60 feet long. I don't recall the height.

Q. Sixty feet long? A. Yes sir.

Q. Was this truck that you were driving equipped with the tachograph which we have introduced into evidence here? A. It was.

Q. And you occasionally passed other trucks while in the underpass or overpass down there?

A. I have met other trucks in it, yes.

Q. If you do pass other trucks in there, what is the usual clearance you are able to get between vehicles?

A. Oh, possibly four inches.

Mr. Samuels: That is all.

Mr. Gearin: That is all.

The Court: You are excused, Mr. Embleton.

Mr. Samuels: I would like to ask Mr. Embleton to remain, as we may want him for further questions. [74]

The Court: Please remain in the courtroom today and tomorrow, Mr. Embleton.

Mr. Samuels: We would like at this time to read the deposition of Dr. Howard A. Molter. His testimony was taken by deposition at Eugene, Oregon.

The Court: Don't you think it would be better to call the Plaintiff, so that you would have a foundation laid for some of the questions, as to the physical disability of the Plaintiff.

Mr. Samuels: All right, sir, I think it is a good idea.

Mr. Vergeers: We will call *Mr.* Raish.

ALMA RAISH,

the Plaintiff in the above-entitled cause, thereupon being produced as a witness in her own behalf, having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Vergeers): Mrs. Raish, will you please state your full name to the Jury, please?

A. Alma Raish.

Q. And Mrs. Raish in the course of your testimony will you speak up so that you may be heard by the last Juror. Where do you live, Mrs. Raish?

A. I have lived in Eugene, but I live now at Akron, Ohio. [75]

Q. You have been a resident of Eugene, Oregon?

A. Yes, I have.

(Testimony of Alma Raish.)

Q. Have you lived in Oregon for the last seven or eight years?

A. Yes, I have lived in Eugene and Springfield.

Q. At what address was you last place of residence when you lived at Eugene?

A. My address was 3889 East 21st Street, Eugene, Oregon.

Q. With whom did you live? ...

A. My husband and we were keeping Jimmy Calahan.

Q. He was your nephew?

A. He was my nephew's little boy.

Q. The three of you lived at that residence there? A. That is right.

Q. Prior to this accident, Mrs. Raish, what was your health like?

A. It was excellent, as perfect as it could be.

Q. Your health was excellent?

A. That is right.

Q. Were you employed at all? A. I was.

Q. What type of work were you doing?

A. I was an oiler for the Southern Pacific.

Q. You worked for Southern Pacific Railroad Company?

A. I worked five years, up until a year and a half ago and then we were laid off. We didn't work for about a month steadily after that and then we had been working for about a month. [76]

Q. What sort of pay did you receive?

A. I don't recall just at that time what it was. All I know is, it is $1.69 per hour right now.

(Testimony of Alma Raish.)

Q. Do you recall what your check would amount to at that time?

The Court: Is there any disagreement on that pay?

Mr. Gearin: I think it is $257.32 a month.

Q. (By Mr. Vergeers): Does that seem right to you, Mrs. Raish?

A. I think we were on a five day week. I know it had been around that at that time. Maybe a little bit more.

Q. Now, Mrs. Raish, did the family maintain a car? A. Yes.

Q. What sort of a car was it?

A. It was a year old Fraser.

Q. Now on the day of this accident, Mrs. Raish, the 17th day of October 1950, did you go out in your automobile? A. We did.

Q. At what time of day did you leave home?

A. We were trying to make it to this appointment at 1:30, so it was probably 20 minutes after one, something like that.

Q. And you left Eugene, did you?

A. We left from home.

Q. From Springfield?

A. We lived about halfway between Springfield and Eugene. [77]

Q. Where were you going?

A. We were going to a chest clinic. They were holding that, and asked everybody to attend.

Q. Was that for a chest x-ray to be taken at that time? A. Yes.

(Testimony of Alma Raish.)

Q. Anybody in the neighborhood could go?

A. Yes, everybody was asked to cooperate in the affair for the neighborhood, especially if there were any children in the family, they wanted the parents to have them chest x-rayed, mostly for clinical purposes.

Q. What was that?

A. As I recall we had an appointment and we were a little bit early. We were trying to be there on time.

Q. When you left home, did you drive the car or somebody else? A. I don't drive.

Q. Your husband drove the car then?

A. That is right.

Q. Do you recall when you reached the underpass and just passed it— do you recall it as it has been described here in this trial? A. Yes.

Q. Do you recall going under it? A. Yes.

Q. What was done right immediately after, as to driving the car after you went through it?

A. There was so much traffic coming and going on each side, my [78] husband pulled off to the side of the road. We sat in the car waiting for a break in the traffic.

Q. You went off to the left side of the road there or the right side?

A. To the right side there.

Q. You wanted to make a left turn?

A. Yes.

Q. Is there a road that leads to the left as you go south?

(Testimony of Alma Raish.)

A. There is a road that leads into the trailer court there.

Q. Is that where the chest x-ray set up was?

A. That is right.

Q. Now when your husband pulled off the road, he pulled off to wait for this traffic to subside?

A. That is right.

Q. He pulled clear off the road? A. Yes.

Q. You sat there and waited for the traffic to clear?

A. We were there a very short time: we had just stopped an instant.

Q. About how far off the pavement was the car?

A. I really don't know. I think it was well off the road into this parking place that is in front of this building.

Q. That is the auto wrecking place up beyond the underpass? A. That is right.

Q. What was the first thing you knew about this accident? [79]

A. Well, there was a bump on the back of the car.

Q. I beg your pardon.

A. There was a bump on the back of the car.

Q. Was it a light bump?

A. Not too heavy. I think Jimmy must have seen it because he was standing up in the middle, and he screamed.

Q. Then there was the bump?

A. The bump against the car started to move the car, and my husband and I glanced around to each

(Testimony of Alma Raish.)

other in surprise and put our hands up to protect little Jimmy. He used his left hand on the steering wheel and helped to hold Jimmy with his right hand. I automatically put out my left hand to hold up Jimmy. Then there was just a crunching, grinding and jamming all over.

Q. The grinding was of the glass and metal?

A. Yes, it easily could have been.

Q. Then you found yourself pinned inside of the automobile?

A. That is right. I was twisted around in the car, and when it finally came to rest, I was pinned down in the front someway, jammed up against the dashboard.

Q. Do you know what your position was at the time the car came to rest?

A. I seemed to be right along the edge—jammed and pinned under the front seat, crunched down in front with the seat up around me. The seat and all was crowded in and the windshield was right up against me, with all the other stuff pushed right together. [80]

Q. It was all piled toward you, sort of on top of you? A. That is right.

Q. Were you aware of what happened to the other persons in the car?

A. No, I wasn't; I couldn't see them. I couldn't move at all. I was just pinned in there so tight that I couldn't move at all.

Q. Were your injuries at all painful at that time?

(Testimony of Alma Raish.)

A. Yes, I was in excruciating pain. My greatest sensation was my legs felt like they were burning up, and I could hardly breathe; something crushed down my chest. I told them unless they did something, I wasn't going to live very long. I think I told them I thought they could remove some of the vehicle.

Q. They raised some metal then and relieved the pressure on your chest?

A. They have me some injections in my right arm and they did that.

Q. That permitted you to feel a little relief?

A. A little bit; it made me feel a little bit better.

Q. What, if anything, hurt you worse at that time?

A. I wasn't too conscious of anything in particular. If anything, I just felt like I was going to die. I was wondering about the others; I tried to talk to them. Everything was so quiet and crunched down, it seemed like it was just the end. I didn't see how there could be anything alive; I just didn't see how they could be anything but dead. [81]

Q. Do you recall anyone administering any first aid to you while you were in there?

A. I asked them if they could get a doctor to put me out, and they said a doctor was on the way. I knew he was there when he finally came. He talked to me; I can't say I felt him give me anything.

Q. Did you remember his coming?

A. I knew he was there.

(Testimony of Alma Raish.)

Q. Do you recall his administering you anything?

A. I really can't say, I really can't say I felt it. I knew he did.

Q. Do you recall being removed from the automobile finally?

A. No. I could lift this arm some and swing it around and I knew when they lifted me out.

Q. You knew that when they lifted you out?

A. Yes.

Q. Did you know you were injured then?

A. Yes.

Q. Did that involve any pain?

A. Yes, it did.

Q. What kind of pain?

A. My shoulder were broken, collarbones were broken, and my ribs were hurt—they certainly hurt.

Q. These bones would grate together, would they? A. That is right. [82]

Q. Then where were you taken?

A. I was taken to the hospital.

Q. Now would you tell the Jury any particular injuries of your own knowledge that you received. You were bruised all over. Did you suffer from any particular bruises that you know of—any particularly severe bruises?

A. I was bruised all over—breast, arms, and shoulders, and legs.

Q. Did you suffer any cuts or abrasions?

A. Well, some on my arm, inside my nose, and I had a big tear on my right leg.

(Testimony of Alma Raish.)

Q. Quite a large place where the flesh was torn out?

A. Yes, the flesh was almost all taken out of there to the bone.

Q. About how much of it, how long was it?

A. I think it is about 7 inches long.

Q. Did they later apply a skin graft to that area?

A. Yes, they did. It seemed to have gotten some local infection in it, so they took the skin off of another place and applied a skin graft there.

Q. This wasn't infected at first?

A. Yes, it was—there was no flesh there left, so that they had to suture it up. They couldn't seem to get it to heal, and that was just the way they had to take care of it. They grafted skin on it. [83]

Q. Did that require an operation?

A. They took me to the operating room and took this skin off my thigh. It wasn't one of those painful operations. They just took skin off one place and put it on there and sewed it all in one piece.

Q. Was that taken off your left thigh?

A. That is right.

Q. And applied to what leg?

A. To the right leg.

Q. Did you have any other cuts, Mrs. Raish? You said your nose was bleeding and you had this severe abrasion on your leg?

A. Well, my eyes were swollen shut, and my face was all bruised. There seemed to be a very bad place on my lip. It seemed like my head hit the windshield and was very swollen there on my lip.

(Testimony of Alma Raish.)

Q. Did you have any particular trouble with your—let's go through with all of it at this particular time. How about your shoulders; what trouble did you have with them?

A. Well, the shoulders were swollen, and I really didn't have any use of my arms, because when I lifted them——

Q. Well, did you have any strength in your arms when you moved them? A. No.

Q. Were you able to move your legs?

A. Not for several days. I didn't have strength to move them. [84]

Q. Were you able to move your body at all?

A. Not myself, no.

Q. What was done in the way of treatment for you, that you were aware of?

A. I know they gave me injections and intravenous feedings, and after a few days, they came up to my bed and applied this cast to my left leg. I think it was about a week before they put the cast on the upper body, up over my arms.

Q. Where did this cast come?

A. One came all the way down by left leg—I had a fracture of my left ankle.

Q. You had a fracture of your left leg too?

A. Yes.

Q. How about your pelvis—was anything done about the bones of your pelvis?

A. They just kept me quiet. I couldn't move off my back.

Q. How long was it before you could move off your back?

(Testimony of Alma Raish.)

A. Before I could really turn over on my own to any great extent was 6 months.

Q. How long were you in the hospital?

A. I was in the hospital from the 17th of October to the first of the year.

Q. Now when you left the hospital, you were able to sit up, I assume?

A. Yes, but that is just about all. [85]

Q. How did you leave there?

A. My husband's brother came and got me and carried me to the car, and carried me into his home.

Q. To go back to the hospital experience, did you go back to the hospital shortly thereafter?

A. Well, I went home for Christmas— I went to their home for Christmas; then I went back again.

Q. But after you finally got out, were you back in there again?

A. I was back there in March of last year.

Q. In March? A. Yes.

Q. About how long were you there that time?

A. I think it was 5 days.

Q. Let's start with the treatment at the hospital. You have told about your operation of the leg and transfer of skin from one thigh to the lower leg and the casts, and you you told how your shoulders were immobolized and your leg immobolized. What else was done for you? You had blood transfusions, intravenous feedings; now what else was done for you?

A. They took a lot of x-rays and things like that. After this operation the anesthesia made me

(Testimony of Alma Raish.)

ill and got my stomach upset, and it went into stomach flu and I had to have more intravenous feedings.

Q. By this time you were able to eat by yourself, but you were unable to eat right after this operation? [86]

A. Oh, yes, by then I could, but at that time I wasn't able to eat. I just couldn't eat.

Q. Was any of this treatment painful at all?

A. Well, I wouldn't say all of it was; but the blood transfusions and the intravenous feedings are, especially the intravenous feedings are if the veins are as large as mine and you have to go in about seven times to get to the arteries for the intravenous feedings.

Q. You were kept in one position?

A. Yes, that is right.

Q. Where were these feedings made?

A. They were in the thigh and they were swollen all of the time.

Q. Did you have to lie flat on your back and did that cause you any pain at all?

A. It certainly did after you took the cast off, my back just about killed me.

Q. How about the skin graft operation on the lower leg—was that at all painful?

A. Well, the donor spot was very painful, especially when they used alcohol on it. It was very painful.

Q. Did that pain continue for some time?

A. Yes, it did.

(Testimony of Alma Raish.)

Q. Did you suffer from any headaches?

A. No, I don't think so. [87]

Q. You were actually not unconscious during that period of time until they got you to the hospital?

A. I don't think so. I think after they got me to the hospital they must have given me something and I went to sleep. I don't think I was unconscious for long periods of time, however.

Q. Except for brief periods, when you had anesthesia and things like that?

A. That is right.

Q. What was the occasion for your going back to the hospital in March?

A. I think it was in March some time, the Sunday before Easter, right before Easter.

Q. What was the occasion for that?

A. I had developed a condition in the deep veins.

Q. How did you know about that?

A. Well, from the time I was in the hospital my legs swelled more or less just as I lay there and wasn't on them that length of time. Then I was up and on my legs and then they swelled more and edema set in. They were very badly swollen after I got out of the hospital and I kept going back to the doctor and it was on one of these trips that I went to the doctor that he put me in the hospital.

Q. Then after this condition developed, there was a lot of swelling, followed by a whole lot more swelling in your legs. Then you went back to the hospital for observation? [88]

(Testimony of Alma Raish.)

A. I went back to the hospital, the doctor sent me to the hospital.

Q. What was done?

A. There were some more painful shots—some stuff put into the blood to thin the blood to try to dissolve the clots.

Q. Did that treatment improve your condition at all?

A. While I was in the hospital, I kept off my legs and the swelling went down some; after that when I got out, it went back up again. I have been wearing elastic stockings ever since to relieve the swelling a little bit.

Q. You wear them all the time? A. Yes.

Q. Can you remain on your feet for any length of time?

A. Not without my legs swelling.

Q. When they swell, is it very painful?

A. Yes, it is; it is very uncomfortable.

Q. Have you been doing any work at all since the accident? A. No, I haven't.

Q. Are you able to do any work?

A. No, not any hard work.

Q. Has your condition noticeably improved in the last couple of months at all?

A. No, I don't think so.

Q. Is your condition as far as you are able to tell now—is it static; that is, it doesn't change at all? [89] A. It seems to be.

Q. It is getting no worse that you are aware of?

A. No.

(Testimony of Alma Raish.)

Q. How about your face? You said in your testimony, I believe, that your face was all bruised, your eyes were shut. Were the injuries that you had to your face healed properly?

A. Well, my upper lip—there was a place on my upper lip that was bruised and a lump there. Now this lump is numb. I can't feel anything.

Q. How about the upper area?

A. I think there was a broken cartilage in my nose.

Q. Do you have any idea of what might have cut the tissues?

A. It was just bruised, hit anyhow. There was a mark across the lip; it wasn't cut openly, but there was a mark across there.

Q. Mrs. Raish, did—has there been any change in your mental condition, which causes you concern?

A. Well, my mental condition doesn't seem to improve any.

Mr. Gearin: We object to that about any attitude of hers. That is not covered in the Pre-trial Order as to any change or whether or not she suffered any mental condition as a result of this accident.

Mr. Vergeers: The application is only to show that she suffered shock and damage to her [90] nervous condition as a result of this accident, Your Honor.

Mr. Gearin: If it just goes on for that, I will have no objection.

The Court: All right, go ahead.

(Testimony of Alma Raish.)

Q. (By Mr. Vergeers): What is your age?

A. I am 56.

Mr. Vergeers: That is all.

Cross Examination

Q. (By Mrs. Gearin): Mrs. Raish, up until about now, you have been feeling better as time goes on, haven't you?

A. Well, I can't see any particular improvement in the last six months.

Q. Do you remember when we took your deposition and do you remember telling me then that you thought you had improved?

A. Certainly, I have improved.

Q. And you can do some housework now?

A. I do a little bit of housework: that is about all.

Q. You live with someone back there?

A. With my sister.

Q. You do what you can do around the house, don't you? A. I do very little. [91]

Mr. Gearin: We will have some trouble with this Pre-trial Exhibit No. 38, which is the Covenant, Your Honor.

The Court: Ask her what you want on it.

Mr. Vergeers: She admits that she signed it; there is no question about that.

The Court: There is no question with counsel is there that her testimony will be the same as before in that respect.

Mr. Vergeers: Her testimony will be the same as before on that point, yes.

(Testimony of Alma Raish.)

The Court: I think this is something that Mr. Gearin wants to proceed with.

Mr. Gearin: That is right.

The Court: Have you got a copy?

Mr. Gearin: Yes, there is one here in the deposition. I will take it from the deposition.

Mr. Vergeers: We will agree that we think that is the same as the original, Mrs. Raish.

Q. (By Mr. Gearin): Mrs. Raish, we have agreed this is a copy of the original covenant. You recall that you signed the original of that? A. Yes.

Q. That is the only agreement that you have ever had with the Los Angeles-Seattle Motor Express and the Transport Indemnity [92] Company in connection with your injuries, is that right?

A. That is right.

Q. And you did receive some $27,000 from the Transport Indemnity Company, is that right?

A. Yes, I did.

Mr. Gearin: That is all.

Redirect Examination

Q. (By Mr. Vergeers): Mrs. Raish, in signing that agreement, did you intend at any time, did you ever intend in any way to waive claim as against the Southern Pacific Company?

A. No, I didn't.

Mr. Gearin: We object to this question and answer on the ground and for the reason that this is a written document and speaks for itself. The witness has testified that this is the only agreement she has.

(Testimony of Alma Raish.)

The Court: Objection sustained. The Jury is instructed to disregard the answer of Mrs. Raish.

Mr. Vergeers: That is all.

Mr. Gearin: That is all.

The Court: I think this is a good time to take our afternoon recess. We will take a recess for about 10 minutes. The Jury is admonished as to making up their minds about this case and talking about it [93] before it is submitted to them.

(The Jury leaves the Jury Box.)

Out of the presence of the Jury.

The Court: I am going to call this document, Covenant not to Execute, as it does in the Pre-trial Order, a Covenant Not to Sue, but if you think you want further testimony from Mrs. Raish on this point, you may wish to make an offer of proof.

Mr. Vergeers: I think we will stand on the document, itself.

Mr. Gearin: We will object since the Court has construed this document as a Covenant not to sue, and since we have by Pre-trial Order made it one of our positions that it must be construed as a release, and we would object to the Court construing it in any other way, other than instructing the Jury that it was not a Covenant not to sue, but it should be instructed that it is a release.

The Court: Do you want to state to the Jury the agreement that was made between you and Mr. Samuels, or are you going to do it in your case in chief.

Mr. Gearin: We are going to do something to that effect some time.

(Testimony of Alma Raish.)

The Court: That is all right. The Plaintiff [94] will wind up its case in chief today. Do you want to make your offer of proof at this time.

Mr. Vergeers: Yes.

Mrs. Raish was then interrogated in the Judge's Chambers as follows:

Q. (By Mr. Vergeers): Mrs. Raish, I will ask you to examine this document, Covenant Not to Execute, which you signed agreeing not to sue the Los Angeles-Seattle Motor Express Company. Did you intend by the signing of this agreement to release the Southern Pacific Company? A. No.

Q. Have you ever waived any claims as against them as a result of this accident?

A. I did not.

Q. Did you specifically state at the time you signed this agreement that you reserved your right to sue the Southern Pacific Company?

A. That is right.

Q. Was that mentioned at that time?

A. I don't recall whether it was or not.

Q. Is that what you intended doing, however, to go ahead and sue them? A. Yes.

Q. Is that your testimony? [95] A. Yes.

Q. At the time this money was paid to you, this $27,000 was that considered as full compensation for your injuries?

A. I certainly didn't understand that.

Mr. Gearin: My objection goes to all of this, Your Honor. May that be understood?

The Court: Yes.

(Testimony of Alma Raish.)

Q. Were you told at that time that that document which you were to sign released only the trucking company or was it an agreement for you not to sue the Southern Pacific Company?

A. I understood—I really only released only the trucking company.

Q. You understood that you really did not release them, but you agreed not to sue them or execute any judgment against them, is that what you mean? A. Yes.

Q. (By Mr. Gearin): Mrs. Raish, you understood that by executing that agreement you could not have collected any judgment, any money, any further money from the Los Angeles-Seattle Motor Express Company? A. Yes.

Q. At the time that agreement was entered into with the representative of the Transport Indemnity Company, the truth of the matter is that they told you at that time, they told you or suggested to you at that time that you had a perfect claim against the Southern Pacific Company, didn't they? [96]

A. No, I don't think they did at that time.

Q. You have never discussed the liability of the Southern Pacific Company with any representative of the Transport Indemnity Company?

A. No, I don't think that I did.

Q. Is it not a fact that you made no claim against the Southern Pacific Company by written or oral demand or any commencement of any suit at any time whatever, until after you had made this agreement with the Los Angeles-Seattle Motor Express Company?

(Testimony of Alma Raish.)

A. I understood my brother-in-law was talking about all of that. He told me about that.

Q. Why did you not sue the Los Angeles-Seattle Motor Express Company?

A. Why didn't I sue them?

Q. Yes.

A. I came to this agreement. I needed some money and I had thousands of dollars of expenses.

Q. Did you understand that you were or you were not releasing them from liability—I mean the Los Angeles-Seattle Motor Express Company?

A. I didn't realize that I was releasing them—I released them so that I couldn't get any further money from them. That is what the release says.

Q. Did they explain to you the difference between release and covenant not to execute? [97]

A. Somebody did.

Mr. Gearin: That is all.

Mr. Vergeers: No further questions.

The Court: The offer of proof is rejected for the reason that I have construed the document as a covenant not to sue.

Mr. Vergeers: We understand the Court has construed the document as being a covenant in the nature of not to sue, is that right?

The Court: Yes.

In the presence of the Jury.

Mr. Samuels: The Plaintiff at this time will withdraw from the case our allegations of specification of negligence relative to improper marking of the clearance of the overhead pass inasmuch as there has been no proof in anyway as to that.

The Court: That is all right. Have you any medical expenses other than those set forth in Paragraph IV on page 4 of the Pre-trial Order?

Mr. Samuels: I believe that covers it, Your Honor.

The Court: That is a stipulation then?

Mr. Samuels: Yes.

The Court: What do they total?

Mr. Samuels: $2,285.80.

The Court: Ladies and Gentlemen of the Jury, [98] it is agreed that Mrs. Raish expended the sum of $2,285.80 for medical expenses in connection with the injuries which she sustained. Included in this figure of $2,285.80 are the following expenses:

Rental for crutches from the Eugene Brace and Limb Shop	$ 4.00
Medical expense from Dr. Tom Mulholland	53.00
Ambulance service from the Valley Ambulance Service	30.00
Medical bill from Dr. E. D. Furrer	10.00
Medical bill from Dr. Howard A. Molter	389.50
Medical bill from Dr. Leonard D. Jacobson	51.50
Surgical Hose	20.50
Hospital bill at Sacred Heart General Hosp.	1,396.80
Dr. Wallace Baldwin	330.50

The defendant is not requiring the Plaintiff to prove the reasonableness of those bills by any testimony. He admits that those expenses were rendered and that the charges were reasonable. Of course, he is not admitting that the Southern Pacific Company should pay them, and he does not admit that it is liable for any part of that amount.

It is also admitted that the Plaintiff was employed as a carmen's helper, earning an average salary of $257.32, at the time of this collision and [99] that she has lost income totaling $4,503.10. The Defendant admits the amount of her wage rate and admits if she had been working all this time, she would have earned approximately that much, but it doesn't admit that it is liable for any portion thereof. Is that a correct statement, gentlemen?

Mr. Samuels: Yes.

Mr. Gearin: It is satisfactory, Your Honor. [100]

* * * * *

The Court: Mr. Vergeers, I have been considering the offer of proof that you made, and in view of the fact that I am going to rule the way I am, I see no reason why the offer of proof should not be accepted. I will permit you to call Mrs. Raish to the stand again and make the offer by the questions you have asked her before. Mr. Gearin, you may have an exception.

Mr. Vergeers: I will call Mrs. Raish to the stand, again.

ALMA RAISH

the Plaintiff, thereupon being recalled as a witness in her own behalf, and having already been duly sworn, was examined and testified further as follows:

Direct Examination [135]

Q. (By Mr. Vergeers): Mrs. Raish, you will recall the document which was referred to heretofore during the trial. I think we referred to it as a "Covenant not to Execute" which you entered into with the Los Angeles-Seattle Motor Express Com-

(Testimony of Alma Raish.)

pany. Is that a copy of it which you are being handed now?

A. Yes, I understand it is a copy of it.

Q. I am just having it handed to you now and you keep it for the purpose of the questions I am going to ask you. When did you enter into that agreement with this company?

A. The 26th day of July.

Q. When? A. The 26th day of July.

The Court: What year?

The Witness: 1951.

Mr. Gearin: I assume that my objection goes to all of this questioning, Your Honor.

The Court: That is right.

Q. (By Mr. Vergeer): At that time you entered into that agreement, Mrs. Raish, what was your understanding about that agreement with reference to any claim you might have against the Southern Pacific Company?

A. Well, I didn't understand that this had anything to do with any claim I had against the Southern Pacific Company.

Q. Was it your intention to reserve your claims against the [136] Southern Pacific Company?

A. Yes.

Mr. Gearin: Your Honor, I object to that question; it is highly leading and it is putting words in her mouth.

The Court: Yes, I think it was a leading question, and I think it was improper.

Mr. Gearin: I move that the answer be stricken and the Jury be instructed to disregard it.

(Testimony of Alma Raish.)

The Court: Yes, I am going to strike that. The answer will be stricken and the Jury is instructed to disregard the answer.

Q. (By Mr. Vergeers): Were you conscious of any claim against that company, against the Southern Pacific Company? A. Yes.

Q. Did this document purport to have anything to do with that claim at all? A. No.

Q. What was your intention with reference to the claim against the Southern Pacific Company?

A. Well, I intended to go ahead and try to do something about it.

Q. Press your claim against them, is that what you mean? A. Yes, that is right.

Q. Did you, at that time, understand that this document in any [137] way would prohibit you from doing that?

Mr. Gearin: I don't like to have her understanding; I want to know if anybody told her anything about it.

Mr. Vergeers: I think that is all.

Cross Examination

Q. (By Mrs. Gearin): Mrs. Raish, as a matter of fact, it wasn't until after you made this agreement with the Transport Indemnity Company that you ever thought about a claim against the Southern Pacific Company, and then for the first time you made the claim against the Southern Pacific Company by the filing of this lawsuit?

A. I don't believe I quite understand the question.

(Testimony of Alma Raish.)

Q. As a matter of fact, no time prior to the time you filed this suit, did you ever make any claim against the Southern Pacific Company?

A. My brother-in-law was taking care of it for me.

Q. Do you know whether or not he did make any claim?

A. I am of the opinion that he did. I couldn't say for sure, however.

Q. You don't know whether or not he did, do you? A. No, I really don't know.

Q. Mrs. Raish, you filed this action against the Southern Pacific Company, after you had made this settlement with the [138] Transport Indemnity Company, did you not?

A. Yes, I did, but I knew all the time that I was going to do something about it.

Mr. Gearin: I think that is all.

The Court: Any further questions.

Mr. Vergeers: No, Your Honor.

Mr. Gearin: No, Your Honor.

The Court: That is all, Mrs. Raish. You may have your exception to this whole line of questioning, Mr. Gearin. [139]

* * * * *

Go ahead, Mr. Gearin.

Mr. Gearin: At this time, the defendant would like to introduce into evidence the following: maps which have been identified in the Pre-trial Order, Exhibits No. 57 and 58, the Pre-Trial Exhibit No. 38, being the original Covenant not to Execute and the photographs marked in the deposition of Mr. Embleton, which are numbers 45 to 55 inclusive.

Mr. Samuels: No objections.

Mr. Gearin: ——and the x-rays of Dr. Marxer which were identified in his deposition.

Mr. Samuels: No objections.

The Court: They all may be admitted.

(Two maps were then marked offered and received in evidence as Exhibits No. 57 and 58. The Original Covenant not to Execute was then marked offered and received in evidence as Exhibit No. 38, and photographs marked in the deposition of Mr. Embleton as Exhibits 45 to 55 inclusive were then offered and received in evidence, and x-rays of Dr. Marxer which were identified in his deposition, were then received in evidence.)

Mr. Gearin: The defendant rests.

The Court: Do you have a motion at this time, Mr. Gearin?

Mr. Gearin: Yes, Your Honor. At this time, [188] if the Court please, the defendant moves the Court for an order directing the Jury to return its verdict against the Plaintiff in favor of the Defendant on the ground and for the reasons that:

(1) There is no evidence that the Defendant was guilty of negligence in any one or more of the particulars charged by the Plaintiff;

(2) that any act or any omission on the part of the Defendant constituted proximate cause of the accident and of the Plaintiff's injury and damage and as a corollary to part 2 of our motion we submit that the evidence is uncontradicted and affirmatively establishes that the sole proximate cause of

the accident was the negligence of Mr. Embleton or his conduct, whether negligent or not or as a part B of motion No. 2, the cause of the accident was the conduct of the driver of the unidentified red truck;

(3) the third basis of our motion for directed verdict is this: I appears from satisfactory evidence that the amounts which the Plaintiff received from the Transport Indemnity Company or the Los Angeles-Seattle Motor Express Company, namely, $27,000, is a matter of law just and adequate compensation for her injuries and damages;

(4) the fourth basis of our motion for a directed verdict [189] is based on the legal basis and that is, it affirmatively appears that the document which the Plaintiff has executed, entitled, Covenant not to Execute, has been construed by the Court to be a Covenant not to Sue; it is our position that one of the essential elements of the Covenant not to Sue is a reservation contained in said document to permit one to sue later against a third party. Since this document has not such reservation, the Court, therefore, has to construe the document as a release and considering it as a release, it would inhere to the benefit of the Southern Pacific Company.

For all of the above reasons and therefore as a matter of law, we are entitled to a directed verdict or judgment.

The Court: I am taking your motion under advisement, and will submit the case to the Jury.

(The cause was argued to the Jury by counsel for the respective parties and thereafter the Court instructed the Jury as follows:)

INSTRUCTIONS TO THE JURY

Plaintiff, Alma Raish, seeks to recover for personal injuries which she sustained and which she claims resulted from the negligence of the defendant, Southern Pacific Company. Before taking up the specific charges of negligence made by the plaintiff against the defendant, Southern Pacific Company, I instruct you that the mere fact that an accident occurred is [190] no evidence of negligence and you may not find that either the defendant or anyone else was negligent solely by reason of the fact that an accident occurred. The law does not impose liability upon any person in the absence of fault nor does the law presume that any person is at fault in the absence of proof of such fault. On the contrary, the law presumes that each party involved in this accident exercised the care which an ordinary prudent person would have exercised under all of the circumstances. If the accident happened when all parties were in the exercise of due care, then the law would not impose liability upon anyone. That is, if the accident were an unavoidable one, without fault on the part of any party involved in this case, plaintiff could not recover in this action.

The law imposes upon the party who claims that another is at fault the necessity of proving that claim by evidence. The claim must be proved not only by evidence but also by the greater weight of the evidence. This is known as the preponderance of the evidence. Preponderance of the evidence does not mean the greater number of witnesses but the

greater weight and the convincing character of the evidence that is introduced.

Plaintiff was required to specify the manner in which she claims that the defendant was at fault. I instruct you that the plaintiff is bound by the allegations of negligence charged against the defendant, which I will outline for you, and must recover, if at all, upon those allegations and no [191] others. Therefore, if you believe that the defendant was guilty of negligence in some particular not mentioned in my instructions, you cannot consider such other negligence, even if you find such other negligence existed.

Now the claims of negligence upon which plaintiff must recover, if at all, are the following:

First, that the defendant constructed and maintained its overhead crossing at a height insufficient for the safe passage of persons making ordinary use of the public highway; and second, that it constructed and maintained its overhead crossing at a width insufficient for the safe passage of persons making ordinary use of the highway.

In order to recover, plaintiff is required to prove at least one of these specifications of negligence by a preponderance of the evidence. Negligence is defined as the doing of an act which a person of ordinary prudence would not have done under the same or similar circumstances or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances. In determining whether the defendant exercised reasonable care in the construction and maintenance of the overhead crossing in question, its conduct is

to be measured against the standard of what a reasonably prudent person would have done, or would not have done, under the same similar circumstances.

It was the duty of the railroad company to so construct [192] and maintain its overhead crossing as to afford clearance for ordinary vehicular traffic and in this respect it was charged with anticipating the normal manner in which the highway would be used, including the use of such highway not only by passenger cars and busses but also by trucks and trailers of all kinds and sizes permitted under the Oregon law to use the highway. Vehicular traffic is entitled to use the entire roadway including the shoulders and, in determining whether defendant maintained its overhead crossing with sufficient clearance, you are to consider whether an obstruction was being maintained over them, or any part of the roadway including the shoulders.

I have stated that the defendant was bound to anticipate the ordinary use of the entire roadway and, in absence of notice to the contrary, the drivers of vehicles had a right to assume that the defendant would not maintain an obstruction to the highway which would be dangerous to those using it by ordinary means. Of course, if the danger was so obvious and apparent that persons, in the exercise of ordinary care, would have seen it, particularly drivers who had passed under it on numerous occasions would be charged with notice of it.

In connection with plaintiff's charges of negligence against the defendant, I instruct you that the defendant, that is, the Southern Pacific Company,

had a right to assume that all persons driving vehicles upon the highway would obey the law and would not drive in a careless and negligent manner. [193] Defendant, the railway company, had a right to rely upon such assumption until such time as it knew, or in the exercise of reasonable care should have known, that the law would not be obeyed.

As I have previously instructed you, the plaintiff must prove the specifications of negligence against the defendant by a preponderance of the evidence. This means that, unless the evidence that the defendant is at fault, in one or both of the specifications that I have read to you is clearer and more convincing than the evidence that it was not at fault, you may not find in favor of the plaintiff. In other words, if the evidence that the defendant constructed and maintained its overhead railroad structure at a height and width which would have afforded clearance for cars, busses and trucks making ordinary use of the highway is just as clear and just as convincing as the evidence that such structure was not so constructed, then you may not impute fault to the defendant on such specifications.

The plaintiff need not prove that the defendant was guilty of negligence in both of the specifications. It is sufficient if she proves that the defendant was guilty of only one of them—that is, either that the structure was of insufficient height or that it was of insufficient width so as to permit persons making ordinary use of the highway to operate their vehicles in safety under it. If you find that plaintiff has [194] failed to prove one of such specifications by a preponderance of the evidence, then

your deliberations will be at an end and you will bring in a verdict in favor of the defendant. If, however, you find by a preponderance of the evidence that the defendant was guilty of negligence in one or both of the specifications which I have read, you will consider the question of proximate cause.

Proximate cause is probable cause. It is that cause which alone, or in conjunction with other causes, produced the accident and injury. Thus an act or omission of a person, which sets in operation some factor or other thing that brings about an injury, is held to be the proximate cause of the injury unless the causal force or operation of the act or omission has been broken by some new or intervening cause prior to the injury. A cause without which a result would not have occurred is a proximate cause. This does not mean that the law recognizes only one proximate cause of an injury, consisting of one act or omission by one person. On the contrary, acts or omissions by two or more persons may operate or work concurrently either individually or together to cause an injury and in such a case each is regarded in law as a proximate cause.

Now the defendant has denied that it was guilty of negligence in either of the respects alleged by the plaintiff and it claims that the injuries which plaintiff suffered were due solely to the negligence of Mr. Embleton, the driver of the [195] truck and trailer or due solely to the negligence of the driver of the unidentified red truck which passed Mr. Embleton's truck and trailer in the opposite direction or was due solely to the combined negligence

of Mr. Embleton and the driver of the unidentified red truck.

If you find that Mr. Embleton's conduct constituted the sole cause of the accident and the resulting injuries to the plaintiff, your verdict should be for the defendant, the Southern Pacific Company. Likewise if you find that the sole and proximate cause of the accident and plaintiff's injuries was the conduct of the driver of the unidentified red truck, your verdict must be in favor of the defendant, the Southern Pacific Company, and the same is true if you find that her accident and injuries were caused by the combination of the conduct of Mr. Embleton and the driver of the unidentified red truck.

I so instruct you because, if the conduct of Mr. Embleton or the conduct of the driver of the unidentified red truck alone or the combination of their conduct was the sole cause of the accident and the resulting injuries to Mrs. Raish, the Southern Pacific Company would not be chargeable with any negligence even if it existed because such negligence would not be the proximate cause of the accident.

However, the fact that Mr. Embleton may have been negligent or the fact that the driver of the unidentified red truck [196] may have been negligent does not exonerate the defendant, the Southern Pacific Company, if you find, by a preponderance of the evidence, that the defendant, Southern Pacific Company, was guilty of negligence in either of the two respects that I have read to you and if you find, by a preponderance of the evidence, that such negligence on the part of the Southern Pacific

Company proximately caused or contributed to the accident and the resultant injuries to Mrs. Raish.

I want to make this perfectly clear to you, if Mr. Embleton's conduct, whether negligent or not, solely caused the accident, there can be no recovery. If the conduct of the driver of the unidentified red truck solely caused the accident and the resultant injuries to Mrs. Raish, there can be no recovery against the Southern Pacific Company. If the negligence of Mr. Embleton and the negligence of the driver of the red truck combined and was the sole cause of the accident and the injuries to Mrs. Raish, there can be no recovery against Southern Pacific. That is true even though you find that the Southern Pacific Company was guilty of some negligence in the manner in which it constructed and maintained the overhead structure. However, if you find that the Southern Pacific's structure was improperly constructed or improperly maintained because it was of insufficient width or insufficient heighth to permit persons making ordinary use of the highway to operate their vehicles in safety under it and if you further find that [197] such negligence was the sole cause or a contributing cause to the accident, your verdict should be in favor of the plaintiff even though you find the conduct of Mr. Embleton, or the conduct of the driver of the unidentified red truck, or a combination of their conduct likewise contributed to the accident.

That may not be entirely clear to you so I want to repeat this: If you find that this accident was solely caused by the negligence of the Southern Pacific Company then Mrs. Raish is entitled to re-

cover. Mrs. Raish is also entitled to recover if you find the company was negligent and its negligence combined with the negligence of Mr. Embleton alone or Mr. Embleton and the driver of the unidentified red truck to contribute to this accident.

You will recall that the defendant contends that Mr. Embleton was guilty of negligence in a number of respects. First, that he operated his truck at a speed that was greater than was reasonable and prudent under the circumstances. Second, that he failed to have his truck under proper or any control. Third, that he operated the truck without adequate or efficient brakes. Fourth, that he failed to maintain a proper lookout.

I have already read to you the requirement that you may consider these specifications in the light of the definition of negligence which I have already laid down for you. As you will recall, negligence is the doing of an act which a person of [198] ordinary prudence would not have done under the same or similar circumstances or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances.

I merely want to repeat to you that whether or not that conduct of Mr. Embleton was negligent is not material if you find that such conduct on his part, or the conduct of the unidentified driver of the red truck, or the combination of their joint conduct, was the sole and proximate cause of the accident and resulting injuries to Mrs. Raish. I further want to repeat that, even though one or both of such drivers were negligent, that will not relieve the Southern Pacific Company from its liability if,

in fact, it did have an improper structure and tha structure caused or contributed to the accident an resulting injuries to Mrs. Raish.

If you find in favor of the plaintiff on the basi of the instructions heretofore given you, then yo should determine the amount of damages that th plaintiff should be awarded. Damages, like any othe proposition, must be proved by a preponderance o the evidence and the plaintiff on that issue had th burden of proof. Now the mere fact that I am in structing you on the subject of damages does no mean that I think the plaintiff is, or is not, en titled to recover in this case. I am expressing n opinion on that subject one way or the other. I assessing damages you should take into considera tion the [199] injuries the plaintiff has sustained the pain and suffering which she has endured, an the pain and suffering which she will endure in th future if you find that she has and will in the futur endure pain and suffering.

You should take into account any permanent dis ability plaintiff has sustained as shown by the evi dence in this case, any loss of power in performing labor, any impairment of the ability to earn money considering her position and station in life, and generally, ladies and gentlemen, you should give he such amount as, under the evidence in this case will reasonably compensate her for pain and suffer ing and injuries past, present, and future.

You may also consider the amount expended by her for medical and hospital attention. In this case evidence was introduced that the plaintiff expended $2,285.00 for medical and hospital services and it

is admitted by the defendant that said bills and expenses so incurred are reasonable. Therefore, if you find in favor of the plaintiff, you may allow her not to exceed the sum of $2,285.00 for such medical expenses.

Plaintiff also alleges that by reason of the injuries she has been specially damaged in the sum of $4,503, which represents the amount of wages she contends she lost to date as a result of the accident. It is admitted that, at the time of the accident, she was employed as a carman's helper at an average of $257.32 a month. In the event that you find for the [200] plaintiff, you may allow her said loss of income to date not exceeding the sum of $4,503.

In addition to these two items of special damages, you should award her such sum as general damages which you think is proper for the injuries she has sustained. Your decision with reference to the amount of damages is that which will compensate her for the injuries which she has received in this accident and must be reached and founded upon an unprejudiced consideration of all the facts of the case and without sympathy, prejudice, or a desire to punish anyone and without any thought of the plaintiff's financial condition or the defendant's ability to pay.

You should also consider what her future course will be and whether there is going to be improvement. Plaintiff contends that she has been permanently injured, and I instruct you that, before you are warranted in allowing plaintiff any sum by way of compensation for any alleged permanent

injury, you must be reasonably certain from the preponderance of the evidence that plaintiff has sustained permanent injury and disability. The evidence showed that Mrs. Raish is 56 years of age and, according to the mortality tables presently in use plaintiff's life expectancy is 19.96 years or practically 20 years. The fact that she has this life expectancy does not mean that she will live that long or that she will not live longer. Neither does it mean that she would be employed and [201] earning money during that period of time, but it is one element which you may take into consideration in determining the amount of damages to which she is entitled.

In this case the evidence showed that the plaintiff received $27,000 on account of the injuries which she sustained in this accident from the Los Angeles-Seattle Motor Express. If you find that the sum of $27,000 heretofore received by plaintiff fully compensates her for the injuries which she has sustained, then your verdict must be for the defendant, Southern Pacific Company, even though you have found that the Southern Pacific Company was negligent and that such negligence was the proximate cause or a contributing cause of the accident and of her injuries. This is so because one may not have more than one full recovery for the damages one sustains in one accident. However, if you find that the sum of $27,000 which she received was not sufficient to fully and fairly compensate her for the injuries which she sustained in this accident, then you are to allow her such sum as you believe under the instructions that I have heretofore given you

will fully compensate her for all of her damages without any deductions, because from any verdict in excess of $27,000 which you may bring in the Court will deduct the sum of $27,000, and plaintiff will only receive the difference. I want to make this perfectly clear to you. If you find that the sum of $27,000 fully compensates plaintiff for the injuries which she [202] has sustained, bring in a verdict for the defendant, even though you think that the Southern Pacific Company was solely responsible for this condition, but if you find that the Plaintiff is entitled to recover against the defendant because the defendant was negligent and its negligence caused or contributed to the accident, and if you find that $27,000 does not fully and adequately compensate her for such injuries, bring in a verdict for the amount that will fully compensate her without any deduction of the $27,000 and after the verdict is brought in, I will deduct from that amount the sum of $27,000. The judgment which Mrs. Raish will obtain is the difference.

A word about quotient verdicts. The jury is not permitted to strike an average from the amounts which the individual jurors think that plaintiff is entitled. In other words, you may not agree in advance that the total of the amounts, which each juror feels the plaintiff is entitled to, divided by 12, shall be the verdict of the jury. Of course, if you get to the point of damages, you should discuss it fully just as you do every other phase of the case and on the basis of your discussions arrive at a figure which is satisfactory to each juror—but don't do it by agreeing in advance to add up the

amounts each juror feels plaintiff is entitled to and then divide that total by 12.

I want to remind you that what an attorney says during [203] the course of the trial or in his argument to you or to the Court is not evidence. You may follow the inferences and deductions that are made to you by a particular attorney if they seem reasonable and logical to you but you are not bound to do so. I have not commented upon the evidence in this case more on the credibility of any witness and, if any of you think that you know what I think about this case and how it should be decided, you are not bound by my opinion. Of course, none of you know that.

During the course of the trial, I made a number of rulings on questions of law, particularly on the admissibility of evidence. These rulings have no relation, so far as you are concerned, to the questions of fact. It is your duty to ignore evidence which was ruled out and you are not to speculate on what might have been proved by evidence that was not admitted.

You are the sole and exclusive judges of the facts in the case and of the credibility of all the witnesses. Your power of judging the effect or value of evidence, however, is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence.

The direct testimony of any witness to whom you give full credit and belief is sufficient to establish any issue in the case. Every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in [204] which he testifies,

the character of his testimony, or by evidence affecting his character or motives, or by contradictory evidence. If you find that a witness has testified falsely in any one material part of his testimony, you should look with distrust upon the other evidence given by such witness; and, if you find that any witness has testified willfully false, it will be your duty to disregard entirely all the evidence given you by such witness unless corroborated by other evidence which you do believe.

Any fact in the case may be proven by direct or indirect evidence. Direct evidence is that which tends to prove a fact in dispute directly without any inference or presumption and which in itself, if true, conclusively establishes the fact. If a witness testifies to a transaction to which he has been an eye witness, that is direct evidence, and you have that kind of evidence in this case. Indirect or circumstantial evidence is that which tends to establish a fact in dispute by proving another and which, though true, does not in itself conclusively establish the fact, but affords an inference or presumption of its existence. That evidence is also before you, ladies and gentlemen, in the form of photographs, maps, and x-rays. It is, however, indirect evidence. Indirect evidence sometimes may be stronger on account of the inferences that may be drawn from it than the testimony of the eye witnesses. [205]

You should look with caution upon the oral admissions of any witness, as that kind of evidence is subject to mistake. The party himself may have been misinformed, or may not have clearly ex-

pressed his meaning, or the witness may have misunderstood him.

You will have with you in the jury room the exhibits that have been introduced in this case. You will also have with you the following two verdicts, but before I describe the verdicts, there is a matter that I must take up with counsel.

Out of the presence of the jury.

Mr. Samuels: We have just one exception, Your Honor. We except to the instruction to the Jury that all persons using the highway by the underpass had the right to assume that the defendant would not maintain an obstruction to the highway that would be dangerous to those using it by ordinary means because there was negligence in the use of the underpass here.

Mr. Gearin: We object to the Court instructing the Jury that vehicular traffic is entitled to use the entire roadway including the shoulder thereof in determining whether or not there was sufficient clearance under the overpass, on the ground and for the reason that that statement is an incorrect statement of the law and has no applicability to the instant case. The Jury is to consider only whether an obstruction is [206] being maintained over any part of the highway surface.

We object to the failure of the Court to give Defendant's Requested Instruction Nos. Ia, Ib, and Ic, on the ground and for the reason that there is no evidence of negligence in the record on the part of defendant.

We object to the failure of the Court to give our Requested Instruction Nos. IIa and IIb, on the ground and for the reason that the evidence clearly establishes without contradiction that the negligence of the driver of the truck constituted the sole proximate cause of the accident.

We object to the failure of the Court to give our Requested Instruction Nos. IVa and IVb, on the ground and for the reason that the document which the plaintiff signed was, as a matter of law, a release, and for that reason the Court should have directed the Jury to return a vedict against plaintiff and in favor of defendant.

We object to the failure of the Court to give our Requested Instructions Nos. VIa, VIb and VIc, on the ground and for the reason that it is our understanding that the Oregon statute provides and the Oregon cases hold that the burden of proof must be based upon satisfactory evidence, which the statute defines as the quantum of proof, and not merely the preponderance of the evidence, upon which Your Honor instructed the Jury.

We object to the failure of the Court to give our Requested Instructions Nos. VIIa, VIIb, VIIc and Nos. VIIIa, VIIIb and VIIIc, which requested instructions withdrew the charges of negligence in the two specifications which were submitted to the Jury, on the ground and for the reason that there was no evidence of negligence in either of the two specifications.

We object to the Court withdrawing from the consideration of the Jury the charges made by de-

fendant that Thomas Ivisin Embleton was guilty of negligence in operating the truck without proper brakes and without proper steering mechanism. Our objection is based upon the record, which indicates that there was satisfactory evidence in these two particulars.

We object to the failure of the Court to give our Requested Instructions Nos. XIVd and XIVe, which contained the breaking statute of the Oregon motor code with regard to the negligence of Embleton, it being our contention that under the evidence it was proper for the Court to give the statute as part of its instructions.

We object to the failure of the Court to give our Requested Instruction No. XVII regarding the "covenant not to Execute," in submitting that question to the Jury the Court then permitted the plaintiff to testify concerning her intent to execute that agreement. The Court failed to give an instruction to the Jury to the effect that in the event she did not reserve the right to proceed against Southern Pacific Company, then that document would be a release rather than a [208] covenant not to execute or sue.

We object to the failure of the Court to give our Requested Instruction No. XXI, which advises the Jury that if it finds that if plaintiff has sufficient permanent injury it may find permanent injury on the basis of probabilities only.

In the presence of the jury.

The Court: There are two forms of verdicts. You will use one form if you find your verdict in favor

of the Plaintiff against the Defendant. It reads as follows:

"We the jury duly impaneled and sworn to try the above-entitled cause find our verdict in favor of the plaintiff and against the defendant and assess damages in the sum of ....."

If you find for the Plaintiff and find that she is entitled to damages, I will deduct from that amount $27,000. The other verdict is the verdict for the Defendant. It reads:

"We the jury duly impaneled and sworn to try the above-entitled cause find our verdict for the Defendant and against the Plaintiff."

Before you may bring in a verdict for the Plaintiff—it must be an unanimous verdict; it is signed only by the foreman. I want to admonish the foreman to be sure that the verdict represents the individual view of each member of the [209] Jury. The same thing is true if you bring in a verdict for the Defendant. There is a line for the signature of the foreman and the verdict must be unanimous.

(The bailiff was thereupon sworn and the jury retired to consider its verdict at 12:05 p.m., and thereafter, at 4:15 p.m. of the same day, the jury returned to the court room and the following further proceedings were had:)

The Court: Ladies and Gentlemen, have you arrived at a verdict?

The Foreman: Yes, Your Honor.

The Court: Will you hand it to Mr. Turtlelot. Read the verdict.

(The verdict was read by the Clerk.)

The Court: Poll the Jury.

The Clerk: Is this your verdict, Mrs. Taylor?

Juror No. 1: Yes.

The Clerk: Is this your verdict, Mr. Crumm?

Juror No. 2: Yes.

The Clerk: Is this your verdict, Mr. Harnsberger?

Juror No. 3: Yes.

The Clerk: Is this your verdict, Mr. Oberg?

Juror No. 4: Yes.

The Clerk: Is this your verdict, Mr. Jensen?

Juror No. 5: Yes.

The Clerk: Is this your verdict, Mr. Mosteller?

Juror No. 6: Yes.

The Clerk: Is this your verdict, Mr. Parker?

Juror No. 7: Yes.

The Clerk: Is this your verdict, Mr. Tracy?

Juror No. 8: Yes.

The Clerk: Is this your verdict, Mr. Ortman?

Juror No. 9: Yes.

The Clerk: Is this your verdict, Mrs. Seaton?

Juror No. 10: Yes.

The Clerk: Is this your verdict, Mr. Davis?

Juror No. 11: Yes.

The Clerk: Is this your verdict, Mr. Calkins?

Juror No. 12: Yes.

(Thereupon the Jury retired from the courtroom and the following proceedings were had. The Jury was excused until 10 a.m. the next morning.)

The Court: Is there any reason why this verdict should not now be entered?

Mr. Gearin: May I have additional time within which to interpose a motion for a new trial and for a judgment notwithstanding the verdict?

The Court: Are you asking that we not enter the verdict?

Mr. Gearin: I would like to have a copy of the instructions.

The Court: The verdict is received and filed, but the [211] judgment shall not be entered.

We will adjourn now until 10 o'clock tomorrow morning.

(Case concluded.) [212]

* * * * *

[Endorsed]: No. 13,433. United States Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. Alma Raish, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: June 28, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,443

ALMA RAISH,

Appellee,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant.

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

Southern Pacific Company, appellant herein, intends upon its appeal to rely upon the following points:

I.

The court erred in construing the covenant not to execute (pre-trial exhibit No. 38) as a covenant not to sue and not as a release.

II.

The court erred in failing to give defendant's requested instructions hereinafter quoted, each of which was prefaced by the following request:

"To the Court: The Court will understand that each subdivision of any instruction is to be deemed a separate and complete instruction."

III.

The court erred in failing to give defendant's requested instruction No. VI:

"A. Plaintiff must sustain the burden of proof against defendant by satisfactory evidence.

"B. Evidence is satisfactory only if it produces moral certainty or conviction in an unprejudiced mind.

"C. Only evidence which produces such moral certainty or conviction is sufficient to justify your verdict. Any evidence less than this is insufficient."

IV.

The court erred in failing to give defendant's requested instruction No. VII:

"A. Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a height insufficient for the safe passage of persons making ordinary use of the public highway.

"B. I instruct you that there is no evidence to support this charge.

"C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case."

V.

The court erred in failing to give defendant's requested instruction No. VIII:

"A. Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a width insufficient for the safe passage of persons making ordinary use of a public highway.

"B. I instruct you that there is no evidence to support this charge.

"C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case."

VI.

The court erred in failing to give defendant's requested instruction No. XIV C to E inclusive:

"C. In connection with the charge that the truck of Los Angeles-Seattle Motor Express was being operated without adequate or efficient brakes thereon, I instruct you that there was applicable at the time and place of the accident the following statute of the State of Oregon. (To the Court see 8 O.C.L.A. Sec. 115-376 (e):

" '(e) The brakes of a motor vehicle or combination of vehicles shall be deemed adequate when, on a dry, hard, approximately level stretch of highway, free from loose material, such brakes shall be capable of stopping the motor vehicle or combination of vehicles, when operating at speeds set forth in the following table, within the distances set opposite such speeds, * * *

Miles per Hour	Stopping Distance
10	9.3 feet
15	20.8 feet
20	37.0 feet
25	58.0 feet
30	83.3 feet'

"D. Violation of the foregoing statutes is negligence as a matter of law.

"E. You are instructed that the violation of or failure to obey the requirements of a law which for safety or protection of others commands or requires certain acts or conduct or forbids or prohibits certain acts or conduct is negligence per se, or in other

words negligence in and of itself, regardless of what an ordinarily careful and prudent person might do in the absence of such law."

VII.

The court erred in failing to give defendant's requested instruction No. XVII:

"If you should believe from the satisfactory evidence that at the time plaintiff executed the agreement entitled 'Not to Execute' on July 26, 1951, plaintiff did not expressly reserve the right to sue Southern Pacific Company, then in that event I instruct you that plaintiff can not recover and your verdict must be against plaintiff and in favor of defendant."

VIII.

The court erred in giving the following instruction:

"Vehicular traffic is entitled to use the entire roadway including the shoulders and, in determining whether defendant maintained its overhead crossing with sufficient clearance, you are to consider whether an obstruction was being maintained over them, or any part of the roadway including the shoulders."

IX.

The court erred in withdrawing from the jury's consideration the charges that the driver of Los Angeles-Seattle Motor Express Inc.'s equipment was guilty of negligence in operating the same without an adequate or proper steering mechanism thereon.

X.

The court erred in denying the defendant's Motion for Directed Verdict.

XI.

The court erred in denying defendant's Motion for Judgment non obstante veredicto and for a new trial.

/s/ KOERNER, YOUNG, McCOLLOCH & DEZENDORF,
/s/ JOHN GORDON GEARIN,
/s/ OGLESBY H. YOUNG,
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed June 28, 1952. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD

Southern Pacific Company, appellant herein, hereby designates the following portions of the record, proceedings and evidence upon the trial to be contained in the record on appeal:

Pre-trial Order.

Verdict.

Judgment entered May 7, 1952.

Defendant's requested instructions Nos. VI, VII, VIII, XIV, C to E inclusive, and XVII.

The following portions of the typewritten transcript of proceedings upon the trial:

Page 1 to that part of page 100 ending "Mr. Gearin: It is satisfactory, Your Honor," inclusive;

Page 135 beginning "The Court: Mr. Vergeers, I have been considering the offer of proof that you made, * * *" to page 139 ending "The Court: That is all, Mrs. Raish. You may have your exception to this whole line of questioning, Mr. Gearin.", inclusive;

All of pages 188 to 212, inclusive.

Motion for Judgment non obstante veredicto or in the alternative for a new trial.

Order denying Motion for Judgment non obstante veredicto or in the alternative for a new trial.

Notice of Appeal and Supersedeas Bond.

Stipulation for use of original exhibits.

Clerk's Certificate.

This Designation, and Appellant's Statement of Points to be Relied Upon on Appeal.

/s/ KOERNER, YOUNG, McCOLLOCH & DEZENDORF,
/s/ JOHN GORDON GEARIN,
/s/ OGLESBY H. YOUNG,
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed June 28, 1952. Paul P. O'Brien, Clerk.

No. 13443

United States
COURT OF APPEALS
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, *Appellant,*
vs.
ALMA RAISH, *Appellee.*

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon.

HONORABLE GUS J. SOLOMON, *Judge.*

KOERNER, YOUNG, MCCOLLOCH & DEZENDORF,
JOHN GORDON GEARIN,
OGLESBY H. YOUNG,
800 Pacific Building,
Portland 4, Oregon,
Attorneys for Appellant.

VERGEER & SAMUELS,
DUANE VERGEER,
HARRY F. SAMUELS,
CHARLES S. CROOKHAM,
512 Portland Trust Building,
Portland 4, Oregon,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 10-52

TABLE OF CONTENTS

TABLE OF CASES CITED

TABLE OF STATUTES CITED

No. 13443

United States
COURT OF APPEALS
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, *Appellant,*
vs.
ALMA RAISH, *Appellee.*

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon.
HONORABLE GUS J. SOLOMON, *Judge.*

SUMMARY OF FACTS AND CONTENTIONS

Appellee adopts in general the summary of facts heretofore made in appellant's brief. Appelle does, however, wish to make the following as additional and supplemental statement of facts concerning this accident.

It should be noted from the diagram entered as plaintiff's exhibit No. 14 that there was extensive shoulder on both sides of the highway, both north and south of the underpass concerned in this accident, and that the shoulder, particularly south of the underpass, was of hard and level construction, but consisted of gravel surfacing with

considerable loose gravel thereon, and that in the underpass itself the shoulder on the westerly side of the highway was approximately 17 inches in width, and on the easterly portion was 26 inches in width, and that this shoulder was surfaced with hard packed gravel.

The evidence showed that the truck was eight feet in width; that the paved lane of the highways for vehicles travelling south was approximately eight feet, eight inches, and that for northbound traffic the paved portion was eight feet, four inches, totaling seventeen feet of highway width. For a vehicle eight feet in width travelling in the southbound lane, this would leave four inches clearance from the edge of the highway, and from the center line.

It was contended by appellant that the Los Angeles-Seattle Motor Express truck operated by Mr. Embleton was of excessive height and excessive weight, but no evidence was introduced to support either of these contentions and they were withdrawn from the jury, and this is not now claimed as error; therefore, it must be assumed that this truck was lawful in all dimensions as to the height, width and weight, and was of a common type operated upon the highways of the State of Oregon, and the operation of said authorized vehicles was known to appellant.

It should also be noticed by the pictures introduced as defendants' exhibit No. 4 that there was constructed on the westerly side of this underpass a wooden bulkhead, which bulkhead shows considerable wear and tear

presumably from the passage of traffic and vehicles which came in contact with this bulkhead, which traffic was making use of the shoulder under the underpass on the westerly side.

ANSWER TO SPECIFICATION OF ERROR NO. 1

The Court did not err in construing the covenant not to execute (Exhibit 38) as a covenant not to sue, and not as a release.

ARGUMENT

It is the position of appellee that whether the Court construes the document entered as exhibit No. 38 as a covenant not to sue, or a covenant not to execute, it was correct in construing the document as not being a release. There was clearly no intent from the face of the document on the part of appellee to release either Los Angeles-Seattle Motor Express or Southern Pacific for any action arising out of the injuries sustained by herself. While it is true that the release of one tort feasor would release all joint tort feasors, in the absence of a release of one, none are released. (Stires v. Sherwood 75 Ore. 108, 145 Pac. 645.)

In Pellett v. Sonotone Corporation, 26 Cal. (2d) 705, 160 Pac. (2d) 783, 160 A.L.R. 863, the Supreme Court of California had before it an instrument similar to the one involved in this litigation. In construing the actual affect of this type of an instrument relative to its being a release, the Court stated at page 711:

"A release has been defined as the abandonment, relinquishment or giving up of a right or claim to the person against whom it might have been demanded or enforced (Black's Law Dict.; Ballentine's Law Dict.) and its effect is to extinguish the cause of action; hence it may be pleaded as a defense to the action. A covenant not to sue, on the other hand, is not a present abandonment or relinquishment of the right or claim, but merely an agreement not to enforce an existing cause of action. It does not have the effect of extinguishing the cause of action; and while, in the case of a sole tort feasor, the covenant may be pleaded as a bar to the action in order to avoid circuity of action, a covenant not to sue one of several joint tort feasors may not be so pleaded by the covenantee, who must seek his remedy in an action for breach of the covenant. Sunset Scavenger Corp. v. Oddou, 11 Cal. App. (2d) 92, 53 P. (2d) 188; Hawber v. Raley, 92 Cal. App. 701, 704, 268 P. 943; Matthey v. Gally, 4 Cal. 62, 64, 60 Am. Dec. 595.

The document in question indicates no intent to release either party, and in the absence of an intent to release, it must be presumed that there was no release and a clear intent to pursue this claim into litigation against either or both joint tort feasors is shown thereby. We agree with counsel for appellant when they state, "The agreement does not contemplate cessation of litigation. By its execution appellee only relinquishes her right to collect any part of a judgment." (App. Br. p. 14.) There was, of course, no stated reservation of the right to sue any other wrongdoer, this not being necessary as there was no stated release of any wrongdoer insofar as litigation was concerned.

In the absence of any specific showing on the part appellant that this document was intended to releas party to this claim and to waive any right to seek ju ment against any party, there is no basis on which t document can be construed as a release.

ANSWER TO SPECIFICATION OF ERROR NO

The Court did not err in failing to give any of instructions hereinafter referred to which were reques by appellant:

A.

"(a) Plaintiff must sustain the burden of pr against defendant by satisfactory evidence.

(b) Evidence is satisfactory only if it produ moral certainty or conviction in an unprejudi mind.

(c) Only evidence which produces such mo certainty or conviction is sufficient to justify y verdict. Any evidence less than this is insufficien

ARGUMENT

The Court, while refusing to give the specific wordi requested by appellant in relation to this instruction, in effect give the same instruction to the jury. The Co gave the following:

"The law imposes upon the party who claims t another is at fault the necessity of proving t claim by evidence. The claim must be proved only by evidence but also by the greater weight the evidence. This is known as the preponderance the evidence. Preponderance of the evidence does

mean the greater number of witnesses but the greater weight and the convincing character of the evidence that is introduced." (Tr. 124, 125.)

"In order to recover, plaintiff is required to prove at least one of these specifications of negligence by a preponderance of the evidence." (Tr. 125.)

Even assuming that the instructions given by the trial court were not sufficient instruction to the jury, the Supreme Court of Oregon has indicated in the case cited by appellant, Willoughby v. Driscoll, 168 Ore. 187, 120 Pac. (2d) 768, 120 Pac. (2d) 917, that failure to give this instruction did not constitute reversable error. (168 Ore. 187, 206.) Furthermore, when the instruction given contains the law requested by a party, it is not error to refuse to give the instruction verbatim as requested by the party. Marks v. Herren, 47 Ore. 603, 607, 83 Pac. 385; State v. Megorden, 49 Ore. 259, 269-271, 88 Pac. 306; Schassen v. Columbia Gorge Motor Coach System, 126 Ore. 363, 372, 270 Pac. 530.

Therefore, no error resulted to appellant by the Court's refusal to give this instruction.

B.

The trial court did not err in failing to give the following instruction requested by appellant:

"(a) Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a height insufficient for the safe passage of persons making ordinary use of the public highway.

(b) I instruct you that there is no evidence to support this charge.

(c) I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case."

ARGUMENT

As noted by appellant, appellee relied principally upon Krause v. Southern Pacific, 135 Ore. 310, 295 Pac. 966 in maintaining this action under the Oregon substantive law. The Oregon Supreme Court, in reversing the order of nonsuit granted by the trial court in that case felt that under the evidence adduced, it was a question for the jury whether or not the railroad company had constructed and maintained its overpass so as to afford clearance for ordinary use of the highway.

The truck in the present case was twelve feet three inches in height, and it is undisputed that this was not an unusually high type of vehicle to be operated upon this highway through the underpass.

It is further undisputed that there was not sufficient clearance for the truck to pass through the underpass if it was to any extent off the narrow oiled road surface. It is submitted, therefore, that it is a question for the jury under the evidence in this case whether or not the overhead obstruction was insufficient to afford clearance for ordinary use of this highway. It must be noted that the word "highway" includes both shoulders, and has been variously defined by statute in Oregon as follows:

"Definitions. The following words and phrases when used in this act shall, for the purpose of this

act, have the meaning respectively ascribed to them hereinafter:

* * *

" 'Street' or 'Highway.' The entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic." (O.C.L.A. 115-401.)

"Meaning of words and phrases employed. The following words and phrases when used in this act shall, for the purposes of this act, have the meanings respectively ascribed to them in this section except in those instances where the context clearly indicates a different meaning:

* * *

"Highway. Every way or place of whatever nature open as a matter of right to the use of the public for purposes of vehicular travel. The term "highway" shall not be deemed to include a roadway or driveway upon grounds owned by private persons, colleges, universities or other institutions." (O.C.L.A. 115-201.)

Thus it is submitted that this question was properly for the jury and no error resulted in the Court's refusal to give this instruction.

C.

The Court did not err in refusing to give the following instruction requested by appellant:

"(a) Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a height insufficient for the safe passage of persons making ordinary use of the public highway.

"(b) I instruct you that there is no evidence to support this charge.

"(c) I accordingly instruct you to disregard th same and you are not to consider it in your deter mination of this case."

ARGUMENT

There is no contention by the appellee in this cas that the accident would have happened had the Lo Angeles-Seattle Motor Express Truck remained upon th paved lane of southbound traffic; however, under th Oregon Rule, the truck had a reasonable right to use th shoulder as it existed appurtenant to the highway and clearly appears from the evidence that the collision re sulted from the truck using part of the shoulder an coming into collision with the overhead brace whic extended from the side of the underpass upward an over this shoulder. The use of the shoulder is an ordinar as well as lawful use of the highway. In any event th was a question for the jury.

Therefore, it is submitted that it was a proper que tion for the jury to consider the specification of negl gence II (b) Tr. 5 which this instruction otherwise woul have removed from the consideration of the jury.

D.

The trial Court did not err in refusing to give th following instruction requested by appellant:

"(c) In connection with the charge that th truck of Los Angeles-Seattle Motor Express wa being operated without adequate or efficient brak thereon, I instruct you that there was applicable

the time and place of the accident the following statute of the State of Oregon:

"(e) The brakes of a motor vehicle or combination of vehicles shall be deemed adequate when, on a dry, hard, approximately level stretch of highway, free from loose material, such brakes shall be capable of stopping the motor vehicle or combination of vehicles, when operating at speeds set forth in the following table, within the distances set opposite such speeds. * * *

"Miles per hour	Stopping distance
10	9.3 feet
15	20.8 feet
20	37.0 feet
25	58.0 feet
30	83.3 feet"

ARGUMENT

In Smith v. Pacific Northwest Public Company, et al, 146 Ore. 422, 29 Pac. (2d) 819, the Supreme Court of Oregon considered a similar instruction and the question of error in failing to give said instruction. The Court said on page 431, "The instructions requested do not embrace all of the essential elements of the terms of the brake testing statute under consideration." (To the Court see O.C.L.L. 115-376, sub (e) and sub (f). After quoting part of the statute the Court said, "It is not shown that the uneven street railway track was a proper place to test the brakes of the truck.

In the present case it is shown by uncontradicted evidence that at the time and place of the collision the

truck was partially operating on the gravelled shoulde with loose material thereon, and further that the pav ment itself was wet. Mrs. Guelda Barnhardt testifie (Tr. 56):

"Q. Do you recall the weather conditions?
A. It was raining, I believe.
Q. Was the pavement wet?
A. Yes."

Mr. Embleton stated (Tr. 74):

"Q. About how much space is there between th trucks if there are two trucks of the size of the on you were driving going through there?
A. Oh, about four inches.
Q. Four inches to spare?
A. Yes.
Q. As you mentioned, you swerved over an then there was a crunch — about how far over d you think you swerved?
A. About 14 or 16 inches.
Q. Were you about that far from the yello center line?
A. Yes."

It should be noted that if the truck were swerved a indicated, the wheels must have been on the should under the underpass. Mr. Follette stated (Tr. 37):

"Q. Referring to west edge of the pavement i self, was there—were there any depressions in the as you go through?
A. Just the normal edge of the highway. (6)
Q. Any mud shoulders, anything like that?
A. No, because there was no water in there, n when I got there the day after the accident. I wasn there the day of the accident, but the usual grav right in there, just the normal edge of the highwa like it would be where you are always hitting, th edge is broken like any oiled road would get."

Further, the Court will also note under the exhibits and photographs No. 4, the true condition of the shoulder surfacing of the highway under the underpass, and to the south thereof is depicted.

It is therefore submitted under the evidence in this case in the rule of the Oregon Supreme Court in Smith v. Pacific Northwest Public Service Company, supra, that the road over which the truck was then operating and upon which its wheels were located was not a proper place to test the brakes of the truck in conformance with the statute. Therefore, it was not error for the Court to refuse this instruction.

E.

The trial Court did not err in failing to give the following instruction given by appellant:

> "If you should believe from the satisfactory evidence that at the time plaintiff executed the agreement entitled "(Covenant) Not to Execute" on July 26, 1951, plaintiff did not expressly reserve the right to sue Southern Pacific Company, then in that event I instruct you that plaintiff can not recover and your verdict must be against plaintiff and in favor of defendant."

It should be noted that the statement, "The trial court erred in failing to give the following instruction *given* by appellant" as appearing on page 24 of appellant's brief, should more probably read, "The trial court erred in failing to give the following instruction *requested* by appellant.

Inasmuch as at the time this requested instruction was submitted by appellant, the Court had already ruled

as a matter of law that the document entered as exhibit No. 38 was not to be construed as a release and as being in the nature of a covenant not to sue, appellant was not entitled to have this instruction given to the jury. It should be noted that in the pre-trial order (Tr. p. 10), under issue of law the sole issue of law in the case was whether the execution by the plaintiff in the covenant not to execute constituted a release of Los Angeles-Seattle Motor Express Incorporated, and if so did such release operate to release the plaintiff's claim against the defendant.

Therefore, it is submitted that this was not a proper instruction for the jury as this was a matter of law reserved to the court by both parties under the pre-trial order, and that the Court did not err in refusing to give this requested instruction.

ANSWER TO SPECIFICATION OF ERROR NO. 3

The court did not err in giving the following instruction:

> "Vehicular traffic is entitled to use the entire roadway including the shoulders and, in determining whether defendant maintained its overhead crossing with sufficient clearance, you are to consider whether an obstruction was being maintained over them, or any part of the roadway including the shoulders."

The above instruction was not misleading as it defined a motorist's right to drive upon the shoulders of the roadway, and when considered with other instruction given by the court, it will be noted that the court

did not indicate that this was an unqualified or absolute right. In Transcript on page 126, the Court instructed as follows:

> "Vehicular traffic is entitled to use the entire roadway including the shoulders and, in determining whether defendant maintained its overhead crossing with sufficient clearance, you are to consider whether an obstruction was being maintained over them, or any part of the roadway including the shoulders.
>
> "I have stated that the defendant was bound to anticipate the ordinary use of the entire roadway and, in absence of notice to the contrary, the drivers of vehicles had a right to assume that the defendant would not maintain an obstruction to the highway which would be dangerous to those using it by ordinary means. Of course, if the danger was so obvious and apparent that persons, in the exercise of ordinary care, would have seen it, particularly drivers who had passed under it on numerous occasions would be charged with notice of it."

It should be noted from the last sentence of this instruction that if the danger were so obvious and apparent that persons seeing it would have notice of it, it must follow then that their right to drive against such obstruction would not be an absolute right in the use of the shoulders.

Oja v. LeBlanc, 185 Ore. 333, 203 Pac. (2d) 267, the Supreme Court of Oregon said the following on page 341 of the opinion:

> "If the plaintiff was standing on the shoulder when hit, that fact would present a question for the jury upon the issue of the negligence of the defendant. It is true that the driver of a motor vehicle may use his right-hand side of the highway to its

> full extent, including the shoulder "to its full extent." Zaraha v. Brandli, 162 Ore. 666, 678, 94 P (2d) 718. But, such right is of course, subject to the duty of exercise due care and to maintain reasonable control of the vehicle and a reasonable lookout for pedestrians."

It is submitted that when the instruction is construed as an entity, that the import given to the jury followed the rule of substantive law as laid down by the Supreme Court of the State of Oregon.

In considering this instruction, the court did not have before it the case of Prauss, Admx. v. Adamski, 54 Ore Adv. Sh. 803, 244 P. (2d) 598, inasmuch as this case was argued before the Supreme Court of Oregon some twelve days after this cause was submitted to the jury, and the opinion of the Supreme Court of Oregon was not handed down until the 14th day of May, 1952.

It is true that all parts of the overpass maintained over the shoulder of the highway were visible to a motorist using reasonable care, but it submitted that the motorist is entitled to use the shoulder and is not on notice that an overhead obstruction constitutes a hazard and is not as a matter of law negligent in so operating a vehicle. Therefore, it is submitted that the Court did not err in giving this instruction. We quote from Krause v. Southern Pacific Co., 135 Ore. 130 P. 317:

> "In the absence of notice to the contrary plaintiff had a right to rely upon the assumption that defendants would not maintain an obstruction to the highway which would be dangerous to those using it by ordinary means of travel. It was not

bound to anticipate the negligence of defendants unless it was of such nature as would attract the attention of a person of ordinary prudence and caution. We think it is exacting too high a degree of care to hold that plaintiff was bound to keep his eyes constantly on the direct line of travel looking for defects in the highway, which should not exist. Of course, if the danger was so obvious that a person in the exercise of ordinary care would have seen it, plaintiff would be deemed to have had notice of it. While the evidence is clear that plaintiff knew of the existence of the trestle, as he had passed under it many times, it is reasonable to infer that he had no definite knowledge as to its clearance above the pavement.

ANSWER TO SPECIFICATION OF ERROR NO. 4

The trial court did not err in withdrawing from the jury's consideration the charge that the driver of the Los Angeles-Seattle Motor Express equipment was guilty of negligence in operating the same without an adequate or proper steering mechanism.

The trial court in instructing the jury withdrew this specification of negligence from its consideration inasmuch as there was no evidence to support the charge. The only evidence introduced which might have the remotest bearing upon this question has been cited by appellant in its brief, pages 27 to 28. It should be noted that there is no evidence whatsoever contained in those statements or in the transcript which indicated that the driver of the vehicle had any trouble with his steering prior to the impact with appellant's underpass. The only

time that this occurred by his testimony was after this impact, and prior or simultaneous to the impact with the automobile in which appellee was a passenger.

The driver, Mr. Embleton, stated (Tr. p. 75):

"Q. When this crunch happened, when the upper right part of the truck collided with the crossbeam, what happened to the truck?

A. Well, it lurched to the left.

Q. Then what happened, then what did you do?

A. Well, it lurched off to the other side, it lurched to the left toward the oncoming traffic which were a car and a Greyhound Bus and some other traffic on behind, and I didn't want to hit that bus so I pulled the wheel around hard to the right and as I brought it around to the right, I noticed that there was a light tan automobile sitting there right off the edge of the road. I started to turn the steering wheel to avoid a collision with that car—I didn't have time and I saw then that I was going to hit the car and I said to myself, "I hope there isn't anybody in that car." Of course, it came up to the back end of this car and in the meantime I was still trying to bring the truck back upon the highway. Well, nothing happened, the impact of the car impaired the steering mechanism so I couldn't get it to work, and in the meantime, I thought it was funny that I wasn't slowing down at all. Later I found that (51) during the course of the time this was happening, the petcock on the airbrakes had gotten knocked off and I had no brakes."

Clearly then the Court finding no evidence to sustain this specification of negligence properly withdrew it from the consideration of the jury.

ANSWER TO SPECIFICATION OF ERROR NO. 5

The Court did not err in ruling adversely upon appellant's motion for a directed verdict and a judgment non obstante veredicto, nor for a new trial.

ARGUMENT

The questions raised by this specification of error are essentially the same questions raised by appellant in specification of error No. 2, sub (b) and sub (c). At the close of trial and upon instruction to the jury, the only allegations of negligence concerning appellant submitted to the jury were the allegations concerned with maintaining an overhead obstruction at a height insufficient for the safe passage of persons making ordinary use of the public highway, and in maintaining its overhead crossing at a width insufficient to the safe passage of persons making ordinary use of a public highway.

QUESTION OF NEGLIGENCE ON PART OF APPELLANT PROPERLY SUBMITTED TO JURY

The prime question involved herein is not whether the red truck and the vehicle of Los Angeles-Seattle Motor Express were negligent or were not negligent relative to their operation on the highway at the time the accident occurred. The essential matter is whether the appellant itself is free from any negligence which in the consideration of the jury proximately caused or contributed to the injuries of which appellee complains.

This court should take judicial notice of the fact that the vehicles involved in this accident were of a lawful height, width and weight, and that this highway, and more particularly this underpass were points on the principal arterial highway running north and south through the State of Oregon. The question then becomes one of foreseeability as to whether this railroad in operating and maintaining this overpass could reasonably anticipate that the vehicle of the height and width of the Los Angeles-Seattle equipment would have occasion to drive upon part or all of the shoulder and that in so doing would come in contact with the angle brace reducing the traversable height and width of the highway over the shoulder.

It is not evidence of lack of negligence on the part of appellant that an accident of this character and type did not occur previously. The court should take judicial notice that with increased travel on the highway, and increased carriage of motor freight, the vehicles involved in this carriage have, within legal limits, become increasingly tall and wide.

There is no contention on the part of appellant that the driver of the red truck and/or the driver of the Los Angeles-Seattle truck were not negligent in the happening in this accident. Such is not the issue and appellee was not guilty of nor charged with negligence. Therefore, it is submitted to the Court that there was sufficient satisfactory evidence from which the jury could properly return the verdict heretofore entered.

THE QUESTION OF PROXIMATE CAUSE WAS PROPERLY SUBMITTED TO THE JURY

The second ground of appellant's motion for a directed verdict was that no act or admission on its part constituted the proximate cause of the accident. Appellant also argues in support of this contention that the presence of the overpass was a mere condition as distinguished from the cause of the accident.

Under applicable laws of the State of Oregon as heretofore noted in the brief of appellant and this appellee, the rule appears firmly established in this jurisdiction as laid down by Krause vs. Southern Pacific, 135 Ore. 130, the Court ruled in that case that it was a question for the jury and not a matter of law.

Appellant cites the case of Hansen v. Bedell Company, et al, 126 Ore. 155, 268 Pac. 1020, as having enunciated its theory of proximate cause. In a later case the Supreme Court of Oregon in Stamos v. Portland Electric Power Company, et al, 128 Ore. 310 at 315, had this to say quoting an earlier case:

> "Strictly speaking there cannot be two 'proximate' causes for any injury. Where two or more circumstances each involving negligence, combine to produce an injury which, but for all of them, would not have occurred, these circumstances taken together are the cause of the injury and therefore constitute but one proximate cause."

The question of proximate cause as a matter of law is one to be found rarely, although it appears from appears from appellant's argument that it is its contention that the proximate cause as a matter of law was not

connected with negligence on its part. Foreseeable injury is, of course, a requisite of proximate cause, and proximate cause is a requisite for actionable negligence; however, "foreseeable injury" does not mean that the alleged tort feasor must be shown to have anticipated the exact form which the harm would take. In Aune v. Oregon Trunk Railway, 151 Ore. 622, 51 Pac. (2d) 663, the Supreme Court of Oregon said on page 632:

> "In order to render a party liable for the consequence of his wrongful act, it is not necessary that he should have contemplated or have been able to foresee the precise form or manner in which the plaintiff's injuries would be received.
>
> "The law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen."

and further on the same page:

> "It is utterly immaterial to limit liability when once negligence has been established. In the same note, he says: "* * * liability is to be considered, not from the probable anticipation of particular consequences, but from the probability of an injurious consequence resulting."

Applying this rule to the instant case, it is appellee's contention that in maintaining the obstruction the appellant could reasonably foresee that a motor vehicle would come in contact with the overhead knee braces, and might become disabled or temporarily rendered out of control.

The question of proximate cause as noted by appellant on page 44 of his brief "is ordinarily submitted to the jury"; and under the rule in Oregon when there is a motion for directed verdict the most favorable intention must be given to the evidence in favor of plaintiff. The trial court did not err in submitting this cause to the jury for its careful consideration.

CONCLUSION

The record in this case can but result in the following conclusions:

1. That the document executed by appellee was not a release of any claim, but in the nature of a covenant not to sue.

2. That no error prejudicial to the rights of appellants was committed by the court in instructing the jury.

3. That there was sufficient evidence of the negligence on the part of appellant which was the proximate cause of the appellee's injury to submit to the jury for its consideration.

Respectfully submitted,

VERGEER & SAMUELS
DUANE VERGEER
HARRY F. SAMUELS
CHARLES S. CROOKHAM
Attorneys for Appellee
512 Portland Trust Building
Portland, Oregon

No. 13443

In The

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, *Appellant*,

vs.

ALMA RAISH, *Appellee*.

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

APPELLANT'S REPLY BRIEF

KOERNER, YOUNG, McCOLLOCH & DEZENDORF
JOHN GORDON GEARIN
OGLESBY H. YOUNG

800 Pacific Building
Portland 4, Oregon

Attorneys for Appellant

VERGEER & SAMUELS
DUANE VERGEER
HARRY F. SAMUELS
CHARLES S. CROOKHAM

Portland Trust Building
Portland 4, Oregon

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES

No. 13443

In the

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, *Appellant,*

vs.

ALMA RAISH, *Appellee.*

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

APPELLANT'S REPLY BRIEF

REPLY TO APPELLEE'S SUMMARY OF FACTS AND CONTENTIONS

Appellee has adopted the statement of facts contained in the opening brief but raises one point calling for the necessity of reply, which is that Exhibit 4, being photograph of the railroad overpass, "shows considerable wear and tear *presumably* from the passage of traffic and vehicles which came in contact with this bulkhead." We repeat what was stated in Appellant's

opening brief—there is no evidence in the record to show that the railroad had any actual or constructive notice that the conditions existing at the overpass were dangerous.

It is highly improper to speculate as to the cause or origin of the marks or the type of marks on the overpass bulkhead. Had any prior accidents occurred at this overpass, surely Appellee would have introduced evidence thereof.

REPLY TO ANSWER TO SPECIFICATION OF ERROR NO. I

This Court is directed to the strong dissenting opinion in the case of *Pellett v. Sonotone Corp. et al*, 26 Cal. (2d) 705, 160 P. (2d) 783, 160 A.L.R. 863, cited by Appellee as authority for the proposition that the covenant not to execute should not be construed as having the same legal effect as a release. Unlike the covenant not to execute in the instant case (Exhibit 38) the covenant in the *Pellett* case contained an express recital that the covenant would in no wise prevent recovery from the other joint tort feasor.

The attempted distinction between a release and the subject covenant is entirely artificial. The injured party's right to recover money was as completely abandoned and relinquished when she signed this covenant

as though she had executed a document labelled a "release." Injured parties are interested in money compensation or as termed by some an adequate award, and when the *right to receive money* is bargained away we should be realistic and look at the real purpose of the transaction.

REPLY TO ANSWER TO SPECIFICATION OF ERROR NO. II

A

As to Appellant's requested instruction No. VI, which defines the grade of evidence sufficient to justify a verdict, even in *Willoughby v. Driscoll*, et al, 168 Ore. 187, 120 P. (2d) 768, 121 P. (2d) 917, the Oregon Supreme Court in discussing this instruction stated:

> "We agree that this requested instruction should have been given."

We have no quarrel with Appellee's statement or with the citations of authority to the effect that when the instructions given contain the law requested by the party it is not error to refuse to give the requested instructions verbatim. But this proposition is inapplicable here as the instructions quoted by Appellee at pages 5 and 6 of the Answer deal with the preponderance of the evidence but do not define the *quality* of the evi-

dence. In the *Willoughby* case, cited by Appellee, the error charged was that the trial court gave the usual instructions concerning burden of proof and advised the jury that negligence had to be established by the preponderance of the evidence, but the Court there failed to define the quality of evidence necessary to support the verdict. As noted above the Oregon Supreme Court stated that the requested instruction should have been given. Oregon does not recognize the scintilla rule of evidence as shown by Section 2-111 O.C.L.A.

B

Appellee makes no contention that this overpass was not constructed and maintained so as to afford sufficient clearance for *ordinary use of the highway*. The testimony of Appellee's civil engineer shows that the Los Angeles-Seattle Motor Express truck could have been off the paved portion of the highway to some extent and still not come into contact with the metal knee brace at the top corner of the overpass.

Appellee in presenting definitions of the "street" and "highway" has quoted from the Uniform Motor Vehicles Safety Responsibility Act (Sections 115-401 to 115-437, O.C.L.A.) dealing with the necessity for carrying liability insurance and also from the Uniform Operators and Chauffeurs License Act (Sections 115-201 to 115-234,

O.C.L.A.). The Uniform Traffic Act (Sections 115-301 to 115-3,100, O.C.L.A.) regulates traffic on Oregon highways and is the Act with which we are concerned.

In Section 115-301, O.C.L.A., we find the following definition:

> "The following words and phrases when used in this Act shall, for the purpose of this Act, have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning.
>
> * * *
>
> (r) 'Roadway.' That portion of a street or highway improved, designed or ordinarily used for vehicular travel."

The record conclusively shows there was sufficient clearance under this overpass for persons making ordinary use of the public way and that this charge of negligence should have been withdrawn from the jury's consideration.

C

We adopt Appellee's argument that this accident would not have happened had the Los Angeles-Seattle Motor Express truck remained upon the paved lane of the highway as it existed under this overpass. The truck driver testified that he was forced off the highway

because of another red truck approaching from the opposite direction, stating:

> "I noticed he was quite a ways over in my lane * * * so I swerved to my right to avoid a collision * * *." (Tr. p. 73)

Admittedly, either the driver of the red truck or the driver of the Los Angeles-Seattle Motor Express truck, or both drivers, were driving in a careless and negligent manner which caused the Los Angeles-Seattle Motor Express truck to come into contact with the overpass. Appellee admittedly makes no contention to the contrary. (See p. 19 of answering brief.) The negligent operation of these trucks, the red truck being over the center line and the other truck being off on the gravelled shoulder under the known overpass, cannot be considered an ordinary use of the highway.

Since by the law of the case the Appellant had a right to assume that persons would not drive in a careless and negligent manner (Tr. pp. 126,127), and further since Appellee now states that the Los Angeles-Seattle Motor Express truck, being 8 feet wide, would not have touched the overpass had it remained on the paved lane of the highway, being 8′8″ wide, we submit there is no evidence of insufficient width and such a requested instruction should have been given.

D

With reference to the requested statutory instruction on stopping distances dealing with the efficiency of the truck's brakes, Appellant reiterates its contention that the jury should have been given a standard by which to measure the adequacy of the brakes on this combination of vehicles.

In *Smith v. Pacific Northwest Public Service Co., et al.*, 146 Ore. 422, 430, 29 P. (2d) 819, cited by Appellee, where a similar instruction was requested, the Court held that

> "it was not proper for the court to instruct upon a question which was not an issue both by the pleadings and the evidence."

In the instant case the adequacy of the trucking equipment brakes was made an issue by both the pretrial order and the evidence.

By the requested instruction Appellant did not claim that the Los Angeles-Seattle Motor Express truck driver was negligent if he could not bring his equipment to a stop within the distance specified by statute. The Oregon Supreme Court has referred to this same statute (Section 115-376, O.C.L.A.) as a guide in determining whether brakes on a motor vehicle were adequate when the

undisputed evidence showed that the pavement was wet. See *Hamilton v. Finch*, 166 Ore. 156, 163-165, 109 P. (2d) 852, 111 P. (2d) 81.

Appellant in its request listed the conditions under which the stopping distances were applicable by statute such as a dry and hard surface. We recognize that at the time of this accident the pavement was wet. The request was made only so the jury would have some guide to assist them in determining whether the brakes on this trucking equipment were reasonably efficient, because the undisputed evidence shows that this combination of vehicles was not brought to a stop within a distance of 215 feet, although the equipment was initially travelling at a speed of thirty miles per hour.

The jury should have been given the statutory guide requested by the instruction.

E

As Appellee states, the trial court ruled as a matter of law that the covenant not to execute was to be considered as in the nature of a covenant not to sue. Yet after the Court had so ruled, Appellee was permitted to testify as to her intent in signing the document. If, as Appellee now contends this was a matter solely for the Court's determination, as agreed by the pretrial

order, then Appellee should not have insisted upon making this a question of fact for the jury by eliciting testimony on the subject.

Since the question of intent was the subject of oral testimony by Appellee herself on direct examination and therefore became a question of fact for the jury, the Appellant was entitled to an instruction on its theory of the case. Apparently it is not denied that had there been no reservaion to proceed against third parties, the instrument would have released the Appellant.

The very fact in issue was not properly submitted to the jury.

REPLY TO ANSWER TO SPECIFICATION OF ERROR NO. II

Significantly, "roadway" as defined by Section 115-301, O.C.L.A., does not include the shoulders of the highway, although the trial court was apparently under the belief that it did when it instructed the jury:

> "Vehicular traffic is entitled to use the entire roadway, including the shoulders * * * ." (Tr. p. 126)

Even the case of *Oja v. LeBlanc*, 185 Ore. 333, 203 P. (2d) 267, cited by Appellee in support of the alleged erroneous instruction given, indicates that where a driver of a motor vehicle drives off the pavement and on

the shoulder at the time of an accident, that fact is evidence from which the jury can find negligence on the part of that driver. In the *Oja* case the judgment, based on the jury finding that the defendant was on the shoulder at the time of the accident, was affirmed on appeal.

The Oregon law on the question whether a driver has the right to drive upon the shoulder of the highway was discussed at length in *Prauss, Admx. v. Adamski*, 54 Ore Adv. Sh. 803, 244 P. (2d) 598. Appellee in answering Appellant's contention as to the import of this recent case, when compared with the subject instruction, states only that the *Prauss* case was decided 12 days after judgment was entered in the instant case. A comparison of the language contained in the subject instruction and that part of the *Prauss* opinion quoted in Appellant's opening brief leads the reader to diametrically opposite conclusions. The Federal trial court for the District of Oregon instructed the jury that motor vehicles are entitled to use the entire roadway and the entire width of the shoulders, while the Oregon Supreme Court held in the *Prauss* case that the mere fact that a driver leaves the paved portion of the highway raises an inference of negligence on the part of the driver.

In *Krause v. Southern Pacific Company et al.*, 135 Ore. 310, 295 Pac. 966, relied upon by Appellee, the jury

found an obstruction was mantained *over the paved* portion of the highway when the truck was admittedly making an ordinary use of the highway.

REPLY TO ANSWER TO SPECIFICATION OF ERROR NO. IV

There was direct testimony from the driver of the Los Angeles-Seattle Motor Express truck that the steering mechanism of the truck was impaired (Tr. p. 83). Contradictory testimony by the same witness only served to raise a question of fact which should have been decided by the jury.

REPLY TO ANSWER TO SPECIFICATION OF ERROR NO. V

We disagree with Appellee's statement that it is not evidence of lack of negligence for Appellant to show that other similar accidents had not occurred at this same overpass on previous occasions. In this connection see *Robertson v. Coca Cola Bottling Co.*, 54 Ore. Adv. Sh 1421, 1433, 247 P. (2d) 217, where the Oregon Supreme Court quotes approvingly as follows:

> "'* * * Evidence of the absence of prior accidents resulting from the same physical defect or inanimate cause, under substantially similar circumstances, is admissible to prove that such defect or cause was not dangerous or likely to cause such accidents, and further to prove that the person responsible for the defective condition was not reasonably chargeable with knowledge of its dangerous character. * * *' "

CONCLUSION

Appellant respectfully urges this court to correct the errors of the trial court and reverse the judgment with instructions to grant the motion for judgment notwithstanding verdict, or in the alternative to remand the case for a new trial.

Respectfully submitted,

KOERNER, YOUNG, McCOLLOCH & DEZENDORF

JOHN GORDON GEARIN

OGLESBY H. YOUNG

Attorneys for Appellant.

No. 13444

United States
Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PAPPAS AND COMPANY and FRESH FRUIT AND VEGETABLE WORKERS UNION LOCAL 78, and FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA,

Respondent.

Transcript of Record

Petition for Enforcement of Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-15-52

No. 13444

United States
Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PAPPAS AND COMPANY and FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78, and FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA,

Respondent.

Transcript of Record

Petition for Enforcement of Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-15-52

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

INDEX PAGE

APPEARANCES

A. NORMAN SOMERS,

Assistant General Counsel, National Labor Relations Board, Washington, D. C.,

For Petitioners, National Labor Relations Board.

CHUCK ERVIN,
ROBERT H. BURKE,

Box 1678, El Centro, California,

ROBERT R. RISSMAN,

257 So. Spring St.,

Los Angeles, California,

For Respondents, Fresh Fruit and Vegetable Workers Union Local 78, et al.

MOSS LYON & DUNN, By
ARVIN H. BROWN, JR.,

For Respondent, Pappas & Co.

United States of America
National Labor Relations Board

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Case No.: 20-CB-159.

Date filed: 9/1/50.

Compliance status checked by: D.B.

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of The National Labor Relations Act.

Instructions: File an original and 4 copies of this charge with the NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Labor organization or its agents against which charge is brought

   Name: Food, Tobacco and Agricultural Workers, Local 78, Duke Cunningham and Charles Feller.

   Address: Salinas, California.

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section

(8b) subsections (1)(A), (2) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

   On or about August 5, 1950, said FTA and said Cunningham and Feller, as agents of FTA, did cause Pappas & Co. and Ham Hamilton, foreman of said company at Mendota, California, to discharge Virgil E. Ramey for the reason that said Ramey was a member of the undersigned union and said Ramey refused to pay dues or initiation fees to said FTA.

   On or about August 7, 1950, said respondents caused the employer to refuse reinstatement to Virgil E. Ramey.

   By the above acts and other acts, said respondents are interfering with the employees' right of self-organization as defined in Section 7.

3. Name of employer: Employer Members of Imperial Valley Shippers Labor Committee and Pappas & Co.
4. Location of plant involved (street, city, and state): Mendota, California.
5. Nature of employer's business: Packing Shed Operator.
6. No. of workers employed: Approx. 50.
7. Full name of party filing charge: United Fresh

Fruit and Vegetable Workers Local Industrial Union 78, CIO.

8. Address of party filing charge (street, city, and state): 1010 S. Broadway, Los Angeles, California. Tel. No. RI 7-5331.
9. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Signature of representative or person making charge:

By /s/ H. L. McNAMARA,
CIO Representative.

Date: Aug. 31, 1950.

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80).

[Received in evidence as General Counsel's Exhibit No. 1-A. February 8, 1951.]

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No.: 20-CA-493.

Date Filed: 9/1/50.

Compliance Status Checked By: D.B.

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9(f), (g), and (h) of the National Labor Relations Act.

Instructions.—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer Against Whom Charge Is Brought:
   Name of Employer: Employer Members of Imperial Valley Shippers Labor Committee and Pappas & Co.

   Address of Establishment (street and number, city, zone, and State): Mendota, California.
   Number of Workers Employed: Approx. 50.

   Nature of Employer's Business: Packing Shed Operator.

The above-named employer has engaged in and is

engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and 8(a)(3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.):

   On or about August 5, 1950, the Employer discharged Virgil E. Ramey. This discharge was at the request of Cunningham and Feller, representatives of Food, Tobacco and Agricultural Workers, Local 78, hereinafter called FTA for the reason that said Ramey was a member of the undersigned labor organization and said Ramey refused to join or become or remain a member of FTA.

   At the time of said discharge there was no union shop agreement in effect covering the employees of the employer. That Pappas & Co. is one of the employers named in representation case number 21-RC-1232 now pending before the NLRB.

   At all times since August 5, 1950, employer has failed and refused to reinstate said Virgil E. Ramey.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge: United Fresh Fruit and Vegetable Workers Local Industrial Union 78, CIO.

4. Address (street and number, city, zone, and

State): 1010 S. Broadway, Los Angeles, California. Telephone No. RI 7-5331.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization): Congress of Industrial Organizations.
6. Address of National or International, if any (street and number, city, zone, and State): Send copies of all correspondence to Robert R. Rissman, 257 South Spring Street, Los Angeles 12, California. Telephone No. MI 9708.
7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Date: 31st August 1950.

Signature of representative of person filing charge:

By /s/ H. L. McNAMARA,
C.I.O. Representative.

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80).

[Received in evidence as General Counsel's Exhibit No. 1-C, February 8, 1951.]

United States of America Before the National Labor Relations Board, Twentieth Region

Case No. 20-CA-493

In the Matter of:

PAPPAS AND COMPANY

and

UNITED FRESH FRUIT AND VEGETABLE WORKERS LOCAL INDUSTRIAL UNION 78, CIO

Case No. 20-CB-159

In the Matter of:

FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78, AND FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA

and

UNITED FRESH FRUIT AND VEGETABLE WORKERS LOCAL INDUSTRIAL UNION 78, CIO

CONSOLIDATED COMPLAINT

It having been charged by United Fresh Fruit and Vegetable Workers Local Industrial Union 78, CIO, that Pappas and Company, herein called Respondent Company and Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, herein called Respondent Union, have each engaged

in and are now engaging in unfair labor practices as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C.A., 141 et seq. (Supp. July, 1947), herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, designated by the Rules and Regulations of the National Labor Relations Board, Series 5, as amended, Section 203.15, hereby issues this Consolidated Complaint upon the charges, duly consolidated pursuant to the provisions of Section 203.33 (b) of the Rules and Regulations, and alleges as follows:

I.

Respondent Company is a California corporation engaged in the growing, packing, and shipping of cantaloupes, Persian melons, grain and cotton. Its ranches and packing sheds are located in and about the vicinity of Mendota, California. During 1949, Respondent Company purchased box shook and other raw materials valued in excess of $90,000, and in addition thereto, was party to a contract with the Union Ice Company for icing railroad cars, in which the products of Respondent Company were shipped, which services were provided for Respondent Company at a cost of approximately $10,000. During 1949, Respondent Company sold cantaloupes and Persian melons valued at approximately $450,000 of which approximately 75% was shipped by Respondent Company from Mendota, California, to places located outside the State of California. Dur-

ing 1949, Respondent Company's sales of grain and cotton amounted to approximately $80,000 and $100,000 respectively.

II.

Respondent Union is and at all times material hereto has been a labor organization within the meaning of Section 2, subsection (5) of the Act.

III.

On or about August 5, 1950, Respondent Union acting by and through its officers, agents and representatives caused Respondent Company to discharge Virgil E. Ramey, by requesting such discharge because he was not a member in good standing of said Respondent Union.

IV.

On or about August 5, 1950, Respondent Company, acting by and through its officers, agents and representatives, discharged Virgil E. Ramey, at the request of Respondent Union, because he was not a member in good standing of said Respondent Union.

V.

By the acts set forth in paragraph III above, Respondent Union did cause, and is causing Respondent Company to discriminate against said Virgil E. Ramey, in violation of Section 8 (a) (3) of the Act and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8(b)(2) of the Act.

VI.

By the acts set forth in paragraph III, above, Respondent Union did restrain and coerce, and is restraining and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in and is thereby engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

VII.

By the acts set forth in paragraph IV, above, Respondent Company did discriminate, and is now discriminating in regard to hire, tenure, terms and conditions of employment of Virgil E. Ramey, thereby encouraging membership in Respondent Union and discouraging membership in other labor organizations, and did thereby engage in, and is now thereby engaging in unfair labor practices within the meaning of Section 8(a) (3) of the Act.

VIII.

By the acts set forth in paragraph IV, above, Respondent Company did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in, and is thereby engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

IX.

The acts of Respondent Company and Respondent Union as set forth in paragraphs III and IV,

above, occurring in connection with the operations of Respondent Company described in paragraph I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

X.

The aforesaid acts of Respondent Company as set forth in paragraph IV, above, and the aforesaid acts of Respondent Union as set forth in paragraph III, above, and each of them, constitute unfair labor practices within the meaning of Section 8 (a)(1) and (3) and Section 8(b)(1)(A) and 8(b)(2), and Section 2(6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 30th day of November, 1950, issues this Consolidated Complaint against Pappas and Company and Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, Respondents herein.

[Seal] /s/ GERALD A. BROWN,
Regional Director National
Labor Relations Board.

[Received in evidence as General Counsel's Exhibit No. 1-I, February 8, 1951.]

United States of America
National Labor Relations Board

FIRST AMENDED CHARGE AGAINST EMPLOYER

Case No.: 20-CA-493.

Date Filed: 11/28/50.

Compliance Status Checked By: E.L.

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions.—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer whom Charge Is Brought:
   Name of Employer: Pappas and Company.
   Address of Establishment (Street and number, city, zone, and State): Mendota, California.
   Number of Workers Employed: Approx. 50.
   Nature of Employer's Business: Packing Shed Operator.

The above-named employer has engaged in and is engaging in unfair labor practices within the mean-

ing of section 8 (a), subsections (1) and 8 (a) (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.):

   On or about August 5, 1950, the Respondent discharged Virgil E. Ramey at the request of Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, because said Virgil E. Ramey was not a member in good standing in said Union.

   By the above acts and by other acts and conduct, the Employer has interfered with, restrained and coerced its employees and is interfering with, restraining and coercing its employees in the rights guaranteed them by Section 7 of the Act.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge: United Fresh Fruit and Vegetable Workers Local Industrial Union 78, CIO.
4. Address (Street and number, city, zone, and State): 1010 S. Broadway, Los Angeles, California. Telephone No. RI 7-5331.
5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization): Congress of Industrial Organizations.

6. Address of National or International, if any (Street and number, city, zone, and State): Send copies of all correspondence to Robert R. Rissman, 257 South Spring Street, Los Angeles 12, California. Telephone No. MI 9708.

7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Date: 11-28-50.

Signature of representative of person filing charge:

By /s/ T. F. FLYNN,
C.I.O. Regional Director.

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80).

United States of America
National Labor Relations Board

FIRST AMENDED CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Case No.: 20-CB-159.

Date Filed: 11/28/50.

Compliance Status Checked By: E.L.

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a

complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Labor Organization or Its Agents Against Which Charge Is Brought:

   Name: Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America.

   Address: Salinas, California.

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section (8b), subsection(s) (1) (A) (2), of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.):

   On or about August 5, 1950, it by its officers, agents and representatives, caused Pappas and Company to discriminate against Virgil E. Ramey, an employee, by requesting the discharge of said employee in violation of the provisions of Section 8 (a) (3) of the Act.

By the above acts and by other acts and conduct, the Employer has interfered with, restrained and coerced its employees and is interfering with, restraining and coercing its employees in the rights guaranteed them by Section 7 of the Act.

3. Name of Employer: Pappas and Company.

4. Location of Plant Involved (Street, City, and State): Mendota, California.

5. Nature of Employer's Business: Packing Shed Operator.

6. No. of Workers Employed: Approx. 50.

7. Full Name of Party Filing Charge: United Fresh Fruit and Vegetable Workers Local Industrial Union 78, CIO.

8. Address of Party Filing Charge (Street, City, and State): 1010 S. Broadway, Los Angeles, California. Tel. No. RI 7-5331.

9. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Date: 11-25-50.

Signature of representative or person making charge:

By /s/ T. F. FLYNN,
C.I.O. Regional Director.

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 1001).

Before the National Labor Relations Board

[Title of Cause.]

ORDER CONSOLIDATING CASES AND NOTICE OF CONSOLIDATED HEARING

Amended charges, pursuant to Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C.A. 141 et seq. (Supp. July, 1947), having been filed by United Fresh Fruit and Vegetable Workers Local Industrial Union 78, CIO, in the cases stated in the caption hereof, being Cases Nos. 20-CA-493 and 20-CB-159, copies of which charges are hereto attached, and the undersigned having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay,

It Is Hereby Ordered, pursuant to Section 203.33 (b) of the National Labor Relations Board Rules and Regulations—Series 5, as amended, that these cases be, and they hereby are, consolidated.

You Are Hereby Notified that, pursuant to Section 10(b) of the Act, on the 5th day of February, 1951, at 10 o'clock in the forenoon, in the Civil Service Room, Room 4, U. S. Post Office Building, 2309 Tulare Street, Fresno, California, a hearing will be

conducted before a Trial Examiner of the National Labor Relations Board upon the allegations set forth in the Consolidated Complaint attached hereto, at which time and place the parties will have the right to appear in person or otherwise and give testimony.

In Witness Whereof, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Order Consolidating Cases and Notice of Consolidated Hearing to be signed by the Regional Director for the Twentieth Region on this 30th day of November, 1950.

[Seal] /s/ GERALD A. BROWN,
Regional Director National
Labor Relations Board.

[Received in evidence as General Counsel's Exhibit No. 1-J, February 8, 1951.]

United States of American Before the National Labor Relations Board

Case No. 20-CA-493

In the Matter of

PAPPAS AND COMPANY

and

UNITED FRESH FRUIT AND VEGETABLE WORKERS LOCAL INDUSTRIAL UNION 78, CIO.

Case No. 20-CB-159

In the Matter of

FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78, AND FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA

and

UNITED FRESH FRUIT AND VEGETABLE WORKERS LOCAL INDUSTRIAL UNION 78, CIO.

DECISION AND ORDER

On March 5, 1951, Trial Examiner William E. Spencer issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent Union had engaged in and was engaging in certain unfair labor practices in violation of Section 8 (b) (2) and 8 (b) (1) (A) of the National Labor Relations Act, as amended, and recommend-

ing that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner, however, recommended that the complaint be dismissed as to the Respondent Company. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.[1]

The Board[2] has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations with the following modifications and additions:

The Trial Examiner recommended dismissal of the complaint insofar as it alleged that the Respondent Company had discriminated with regard to the hire and tenure of Ramey in violation of

---

[1]The General Counsel excepted only to that portion of the Intermediate Report relating to the dismissal of the complaint as to the Respondent Company. As no timely exceptions were filed to the findings and recommendations of the Trial Examiner with respect to the Respondent Union, such findings and recommendations are hereby affirmed.

---

[2]Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

Section 8 (a) (3) and (1) of the Act. While finding that Ramey had involuntarily relinquished his job, the Trial Examiner found that he did so not because of any act of the Company but solely because of the conduct of the Respondent Union in instigating a work stoppage which made Ramey's job untenable. Under these circumstances, the Trial Examiner declined to find any violation of the Act by the Company. We do not agree with the Trial Examiner's exoneration of the Company of responsibility for Ramey's loss of employment, but we find, contrary to the Trial Examiner, that the Company did discriminate with regard to Ramey's tenure of employment, thereby violating Section 8 (a) (3) and (1) of the Act. In so finding, we rely on the following considerations:

a. As found by the Trial Examiner, Ramey was hired on August 2, 1950, by the Company to replace Yokas, a member of the Respondent Union, who had been discharged that day for inefficiency. Ramey was also a member of the Respondent Union, but was delinquent in his dues. On Saturday, August 5, Ramey having refused to make up the arrears in his dues, the Respondent Union requested his foreman, Hamilton, to discharge him. Upon Hamilton's refusal, the Respondent Union called a work stoppage. During the stoppage Ramey again refused to pay his dues, and Hamilton, after advising him that the other employees refused to work with him, instructed him to take the afternoon off with pay, assuring him that in the mean-

time he would try to persuade the Respondent Union to let Ramey go back to work. Ramey thereupon left the plant and work was resumed.

However, Hamilton's subsequent efforts to settle the dispute between the Respondent Union and Ramey were unsuccessful. On August 6, a Sunday, Hamilton told Ramey that if he paid his dues he could go back to work, but Ramey refused. On the same day, Hamilton saw Yokas and instructed him to return to work as a replacement for Ramey, hoping that he might thereby placate the Respondent Union and eventually secure permission to reinstate Ramey at some future date.[3] Yokas reported for work the next morning. Ramey also came to the plant that morning, hoping that Hamilton would put him back to work.[4] However, when Ramey appeared, the other employees ceased their preparations for work. Thereupon Hamilton told Ramey, as found by the Trial Examiner, that the other employees would not work so long as Ramey was in the

---

[3]Hamilton testified, in effect, that he hoped that, in consideration of his rehiring Yokas, the Respondent Union would let Ramey go back to work "when the Persians started"—i.e. when work began on the Persian melons—about 10 days later.

---

[4]Ramey testified that he considered that he had been discharged on Saturday, August 5, but hoped that Hamilton "might see his mistake" and give him a chance to return to work. As found by the Trial Examiner, Ramey was accompanied on Monday morning by representatives of the charging Union.

plant, to which Ramey replied, "I'm getting off. I don't want to cause any trouble."[5]

Upon the foregoing evidence, we find that on August 5 the Respondent Employer laid Ramey off pending adjustment of his dispute with the Union over his failure to pay membership dues. It is clear from Hamilton's statements to Ramey on August 5 and 6, and the fact that on August 6 he rehired Yokas to replace Ramey, that it was Hamilton's intention not to recall Ramey unless and until that dispute was settled. As a result of Hamilton's statements, Ramey, himself, as already indicated, con-

---

[5]The Trial Examiner relied in part, at least, on this statement of Ramey's in finding that Ramey was not discharged but had quit his job. Although this statement might possibly be construed as indicating that while Ramey felt he was free to return to work if he was willing to risk the consequences, he elected not to do so, such a construction would be inconsistent with Ramey's own testimony that he considered himself to have been discharged on August 5, and came to the plant on August 7 only because he hoped that Hamilton would change his mind. (See footnote 4, above.) Under these circumstances, we cannot attach controlling significance to Ramey's quoted statement, as evidence of his employment status on August 7 or of his reasons for leaving the plant. Nor, unlike the Examiner, do we give controlling weight to Hamilton's subsequent statement, in response to an inquiry by a representative of the charging Union, that Ramey had not been discharged. This reply in our opinion reflected either Hamilton's intention to reemploy Ramey at some future date, if the Respondent Union permitted, or his natural reluctance to make any statement which might compromise his Employer in the event of litigation.

sidered that he was no longer employed after August 5. Viewed in this context, Hamilton's remark to Ramey on August 7 that the other employees would not work with him, could reasonably be construed to mean only that under the circumstances the Respondent Company was not in a position to offer Ramey further employment. Accordingly, we find, contrary to the Trial Examiner, that the Respondent Employer on August 5, laid Ramey off at the instance of the Respondent Union and on August 7 rejected his request for reinstatement because of the Union's continued adamant opposition to Ramey.[6] There is no evidence that the Respondent Employer thereafter made any effort to recall Ramey.

b. Assuming, arguendo, that the Respondent Employer did not in fact discharge Ramey or lay him off, but that, as found by the Trial Examiner, Ramey quit his job because it had been made untenable by the Respondent Union, we would nevertheless find that the Respondent Company violated Section 8 (a) (3) and (1) of the Act.

The Board has frequently held with judicial approval that an employer violates Section 8 (a) (3) of the Act when he knowingly permits the exclusion of an employee from the plant by any union or anti-

[6]We agree with the Trial Examiner that the Respondent Union's objections to Ramey were due solely to his dues delinquency.

union group.[7] Here, it is clear that the Company knew of the work stoppage by its employees and knew that such stoppages represented a protest against Ramey's presence in the plant. Under these circumstances, it was the duty of the Company to take effective action to assure Ramey that he would be protected in his right to remain at work. Not only did the Respondent Company fail to do this, but on the contrary, it indicated to Ramey its acquiescence in the Respondent Union's demand that Ramey leave the plant. In this manner the Company permitted the Union to arrogate to itself the Company's control over employment, and to secure the termination of Ramey's employment for discriminatory purposes.

Assuming, therefore, that Ramey was not actually discharged or laid off, but, with the knowledge of the Respondent Employer, quit his employment because of the demonstrations against him by the Respondent Union, we find that he quit under such circumstances as to establish a violation of Section 8 (a) (3) and (1) of the Act by the Company.

Under either view, we find that the Respondent Union caused the Company to violate Section 8 (a) (3) with respect to Ramey, and thereby violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act.

---

[7]E.g., Brown Garment Manufacturing Company, 62 NLRB 857; Fred P. Weissman Company, 69 NLRB 1002, enfd 170 F. 2d 952 (C. A. 6), cert. den. 336 U.S. 972; N.L.R.B. v. Hudson Motor Car Co., 128 F. 2d 528 (C.A. 6); Air Products Incorporated, 91 NLRB No. 212.

The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondents, which are set forth in Section III of the Intermediate Report, as modified by the findings in this Decision and Order, occurring in connection with the operations of the Respondent Company, described in Section I of the Intermediate Report, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondent Company unlawfully discriminated with regard to Ramey's hire and tenure of employment and that such discrimination was caused by the Respondent Union, we find that both Respondents are jointly and severally liable for loss of wages incurred by Ramey as a result of such discrimination. However, in accordance with our practice, in view of the Trial Examiner's failure to recommend that the Respondent Company reinstate Ramey with back pay, the liability of the Respondent Company for back pay will be tolled with respect to the period from the date of the Intermediate Report to the date of the Order herein.

Accordingly, we shall order that the Respondents

jointly and severally make Ramey whole for loss of wages[8] incurred as a result of the discrimination against him from August 6, 1950, to the date of the Intermediate Report. We shall further require the Respondent Union above to make Ramey whole for any such loss of wages incurred between the date of the Intermediate Report and the date of this Decision and Order. In addition, both Respondents will be required jointly and severally to make Ramey whole for any such loss of wages suffered by him between the date of this Order and the date of Respondent Employer's offer of reinstatement, except that the Respondent Union's liability for back pay may be terminated by serving notice upon Ramey and the Respondent Employer that it has withdrawn its objection to the employment of Ramey. The Respondent Union shall not be liable for any back pay accruing after the expiration of five days from the date of such notice.

Back pay will be computed on the basis of the amount thereof accrued in each separate calendar quarter, in accordance with the formula established in F. W. Woolworth Company.[9]

We shall further order the Respondent Employer to offer immediate reinstatement to Ramey without

---

[8]Such loss of wages shall be measured by the amount of wages Ramey normally would have earned during the periods specified but for the discrimination against him, less his net earnings during such period. See Crossett Lumber Company, 8 NLRB 440, 497-8.

---

[9]90 NLRB No. 41.

prejudice to his seniority or other rights and privileges, and we shall direct the Respondent Union to notify the Respondent Employer and Ramey that it has withdrawn its objection to Ramey's employment.

Conclusions of Law

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Board makes the following conclusions of law:

1. Pappas and Company, the Respondent Employer is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, the Respondent union herein, is a labor organization within the meaning of Section 2 (5) of the Act.

3. By causing Pappas and Company to discriminate against Virgil Ramey in violation of Section 8 (a) (3) of the Act, the Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

4. By restraining and coercing employees of Pappas and Company in the exercise of their rights under Section 7 of the Act, the Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

5. By discriminating in regard to the hire and tenure of employment of Virgil Ramey, Pappas and Company has encouraged membership in the Respondent Union, in violation of Section 8 (a) (3) of the Act.

6. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed by Section 7 of the Act, Pappas and Company has engaged in and is engaging in unfair labor practices in violation of Section 8 (a) (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders:

1. That the Respondent, Pappas and Company, its officers, agents, successors, and assigns, shall:

a. Cease and desist from:

(1) Encouraging membership in Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, or in any other labor organization of its employees, by discharging any of its employees or discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of their employment.

(2) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

b. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Offer to Virgil Ramey immediate and full reinstatement to his former or a substantially equivalent position,[10] without prejudice to his seniority or other rights and privileges;

(2) Upon request make available to the National Labor Relations Board, or its agents, for examination and copying, all pay roll records, social security payment records, time cards, personnel records and reports, and all other records necessary for a deter-

---

[10]Reinstatement is to be offered to his former position whenever possible, and, if such position is no longer in existence, then to a substantially equivalent position. See The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch, 65 NLRB 827.

mination of the amount of back pay due under the terms of this Order.

(3) Post at its plant at Mendota, California, copies of the notice attached hereto and marked Appendix A.[11] Copies of said notice, to be furnished by the Regional Director, for the Twentieth Region, shall be duly signed by the Respondent Employer's representative immediately upon receipt thereof and promptly posted and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Employer to insure that said notices are not altered, defaced, or covered by any other material.

(4) Notify the Regional Director for the Twentieth Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

2. That the Respondent Union, Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, its officers representatives, agents, successors, and assigns shall:

a. Cease and desist from:

(1) Causing or attempting to cause Pappas and Company to discriminate against Virgil Ramey or

---

[11]If this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

any other employee, in violation of Section 8 (a) (3) of the Act.

(2) In any other manner restraining or coercing employees of Pappas and Company, its successors or assigns, in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, and refrain from any or all of such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

b. Take the following affirmative action which, the Board finds will effectuate the policies of the Act:

(1) Notify Virgil Ramey and Pappas and Company in writing that it has withdrawn its objection to the employment of Ramey.

(2) Post at its business office and wherever notices to its members are customarily posted, copies of the notice attached hereto and marked Appendix B.[12] Copies of said notice, to be furnished by the

---

[12]If this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

Regional Director for the Twentieth Region, shall be duly signed by a representative of the Respondent Union, immediately upon receipt thereof, and shall be promptly posted and maintained by it for a period of at least sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that such notices are not altered, defaced, or covered by any other material.

(3) Notify the Regional Director for the Twentieth Region in writing within ten (10) days from the date of this Order what steps the Respondent Union has taken to comply therewith.

3. That the Respondent Pappas and Company, its officers, agents, successors, and assigns, and the Respondent Fresh Fruit and Vegetable Workers Union, Local, 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, its officers, representative agents, successors, and assigns shall jointly and severally make Virgil Ramey whole, in the manner set forth in the section of this Decision and Order entitled "The Remedy," for any loss of pay suffered as a result of the discrimination against him.

Signed at Washington, D. C., June 15, 1951.

[Seal] NATIONAL LABOR
RELATIONS BOARD.

JOHN M. HOUSTON,
Member,

JAMES J. REYNOLDS, JR.,
Member,

PAUL L. STYLES,
Member.

James J. Reynolds, Jr., Member, concurring and dissenting in part:

I agree with my colleagues in their finding that the Respondent Union violated the Act. However, for the reasons set forth in the Intermediate Report, I would adopt the recommendation of the Trial Examiner and dismiss the complaint as to the Respondent Company.

Signed at Washington, D. C., June 15, 1951.

NATIONAL LABOR
RELATIONS BOARD.

JAMES J. REYNOLDS, JR.,
Member.

Appendix A

Notice to All Employees Pursuant to
a Decision and Order

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not encourage membership in Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, or in any other labor organization, by discharging any of our employees or discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

We Will make Virgil Ramey whole for any loss of earnings he has sustained as a result of the discrimination against him.

We Will offer to Virgil Ramey immediate and

full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

All our employees are free to become, remain, or to refrain from becoming or remaining, members in good standing of the above-named union or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

Dated.....

PAPPAS AND COMPANY,
Employer.

By.....,
Representative Title.

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced, or covered by any other material.

Appendix B

Notice

To All Members of Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, and to All Employees of Pappas and Company

Pursuant to a Decision and Order
of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We Will Not cause or attempt to cause Pappas

and Company to discriminate against Virgil Ramey or any other employee, in violation of Section 8 (a) (3) of the Act.

We Will Not in any other manner restrain or coerce any employee of Pappas and Company in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

We Will make Virgil Ramey whole for any loss of earnings sustained by reason of the discrimination against him.

Dated.....

FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78, AND FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA,

Labor Organization.

By.....,

Representative Title.

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

United States of America
Before the National Labor Relations Board
Division of Trial Examiners

[Title of Causes.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

Upon amended charges duly filed by United Fresh Fruit and Vegetable Workers Local Industrial Union 78, CIO, herein called the charging Union, the General Counsel of the National Labor Relations Board,[1] by the Regional Director of the Twentieth Region (San Francisco, California), issued his consolidated complaint dated November 30, 1950, against Pappas and Company, herein called the Company, and Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, herein called the respondent Union or FTA, alleging that the respondent Company and respondent Union had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 8 (b) (1) (A) and 8 (b) (2), respectively, and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the complaint and notice of hearing were

[1]The General Counsel and his representative at the hearing will be called the General Counsel; the National Labor Relations Board, the Board.

duly served upon the parties, and copies of the charges and amended charges were duly served upon the Respondents.

With respect to unfair labor practices, the complaint alleged in substance that the respondent Union violated Section 8 (b) (1) (A) and 8 (b) (2) of the Act by causing the respondent Company discriminatorily to discharge Virgil E. Ramey, its employee, and that the respondent Company violated Section 8 (a) (1) and (3) of the Act by its discriminatory discharge of the said Virgil E. Ramey.

Neither Respondent filed an answer.

Pursuant to notice a hearing was held at El Centro, California, on February 8, 1951, before William E. Spencer, the undersigned duly designated Trial Examiner. All parties were represented at and participated in the hearing where full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded them. At the close of the hearing all parties waived oral argument and the filing of briefs with the undersigned.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Company

Pappas and Company is a California corporation engaged in the growing, packing, and shipping of cantaloupes, Persian melons, grain and cotton. Its ranches and packing sheds are located in and about

the vicinity of Mendota, California. During 1949, the Company purchased box shook and other raw material valued in excess of $90,000, and in addition thereto, was party to a contract with the Union Ice Company for icing railroad cars, in which the products of the Company were shipped, which services were provided for the Company at a cost of approximately $10,000. During 1949, the Company sold cantaloupes and Persian melons valued at approximately $450,000, of which approximately 75 per cent was shipped by respondent Company from Mendota, California, to places outside the State of California. During 1949, the Company's sales of grain and cotton amounted to approximately $80,000 and $100,000, respectively.

It is found that the Company is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act for the Board to assert jurisdiction herein.[1a]

II. The labor organizations involved

The respondent Union and the charging Union, respectively, are labor organizations within the meaning of Section 2 (5) of the Act.

III. The unfair labor practices

1. The Facts

Virgil Ramey was employed by the Company on August 2, 1950, to replace James Yokas (referred to in the transcript at times as King) who had been discharged that same day. He was employed outside

---

[1a] Imperial Garden Growers, 91 NLRB 167.

the packing shed to dump melons from trailers as they were brought to the shed for sorting and packing. He testified that he had been a member of FTA, the respondent Union, for 8 to 10 years but admittedly was delinquent in the payment of his dues at the time he was employed by the Company.

On August 4, Chuck Feller, an organizer or business agent of FTA, approached Ramey while the latter was at work and asked to see his dues book. Ramey replied that he was not sure he had it but would look and see. Feller said he would be back the next day.

On the following day Ramey was approached while at work by Duke Cunningham, another business agent or organizer of FTA. Cunningham also asked to see Ramey's dues book and Ramey replied that he did not have it and that Feller had already spoken to him about it. That same afternoon Feller returned and when told by Ramey that he did not have his dues book asked Ramey if he was "paid up." Ramey admitted that he was delinquent. Feller replied that there were others delinquent and referred particularly to an employee named Sunny Ward. "Of course he is CIO and won't pay," Feller said. Ramey replied that he felt the same way Ward did, and indicated that he would not pay any further dues to FTA until an election had been held—referring, apparently, either to an election to determine bargaining representatives or a union shop election. This terminated the conversation.

Some thirty minutes later all the machinery in the packing shed was shut down. Ramey went, or was

called, into the shed where he observed that the packers had stopped working and that Cunningham, Feller, and Theron Hamilton, shed foreman, were engaged in conversation. Ramey approached this group and heard Feller say that one reason for the "shut-down" was that there was a man working outside who did not belong to FTA. Ramey asked Feller whom he was referring to and when Feller replied, "You," an argument followed in which Ramey called Feller a liar. Cunningham said that a check of union records showed Ramey a year and a half behind in his dues. A discussion of dues followed in which Ramey refused to pay up his delinquent dues. Finally, Ramey went outside the shed and a short time later the machinery started up and the packers resumed their work. Hamilton came out of the shed and told Ramey that the men refused to work until he was "off the shed," and instructed him to take the rest of the day off, promising to pay him for the full day's work. "I hope something will develop and you will go back to work over the week end," Hamilton told Ramey, and the latter replied, "O.K. if that is the way it is * * * That is the way it has got to be." Ramey then left the plant.

On the following day, a Sunday, Ramey saw Hamilton in town and the latter asked him why he didn't go ahead and pay his delinquent dues. Ramey refused; refused, also, Hamilton's suggestion that he apologize for his part in the altercation of the previous day.

On the next day, a Monday, Ramey returned to

the packing shed accompanied by two representatives of the charging Union. The packers were putting their aprons on preparatory to going to work. When Ramey and his companions appeared, they left their work stations and began removing their aprons. Hamilton came over to Ramey and told him, "Well, the boys refuse to work while you are around the shed." Ramey replied, "I am getting off. I don't want to cause any trouble."[2] Ramey returned to the Company's plant thereafter only to pick up his pay check. He was given a full day's pay for the preceding Saturday when, at Hamilton's direction, he had left the plant before the end of the work day.

The foregoing findings of fact are based on Ramey's credible testimony which is in all important particulars consistent with Hamilton's testimony on the same events.

Hamilton testified that on the day that Ramey was employed, or the day following, Feller asked him why he had Ramey working there, that Ramey was not a union member, and suggested that he put Yokas back to work and let Ramey go. Hamilton refused. On Saturday, Feller again asked Hamilton to discharge Ramey and Hamilton again refused, stating that he believed it would be a violation of

---

[2]Ramey's testimony: "So then the packers came out from behind their dumps and took their aprons off and stood up in a bunch over there and Mr. Hamilton came over to us and he said, 'Well, the boys refuse to work while you are around the shed.' So I says, 'I am getting off. I don't want to cause any trouble.' "

the Act to do so. Later, Cunningham came into the shed and he and Herschel Crow, FTA shop steward, talked to the packers, after which the packers stopped work. Cunningham formally demanded that Hamilton discharge Ramey and put a "union man" in his place. Hamilton refused and Cunningham replied that the Company plant was going to be a "closed shop from here on out." Ramey was called in, and the altercation previously recited, took place.

Hamilton saw Feller on the following day, Sunday, and asked that Ramey be permitted to return to work. Feller replied that Ramey was "no good for the union" and refused to agree that Ramey go back to work.

Hamilton's version of what happened when Ramey returned to the packing shed on Monday is consistent with Ramey's own testimony, recited above.[3]

2. The issues; conclusions

The issues are (1) whether the respondent Company discriminatorily discharged Ramey and (2) whether the respondent Union caused or attempted to cause the Company to discharge Ramey in viola-

---

[3]Hamilton testified: "Ramey was present and the crew refused to go to work if he was on the job so Ramey told me 'If they don't want to work, well, I will leave, I will leave the shed, I won't cause any trouble.' "

tion of Section 8 (a) (3) of the Act.[4] No answers were filed to the complaint, but the evidence was taken and all issues were litigated at the hearing. The respondent Union's position at the hearing was that in seeking Ramey's discharge it was merely processing a grievance on behalf of Yokas who had been discharged by the Company and whose position was filled by the employment of Ramey.

It is clear from the mutually corrobative testimony of two credible witnesses, Ramey and Hamilton, that had Ramey been willing to pay up his delinquent dues in the respondent Union and maintain his allegiance to it, the respondent Union would not have sought his discharge. I credit Hamilton's testimony that Yokas' discharge was for cause and that the FTA acknowledged it was for cause, and that no attempt to prosecute a grievance in Yokas' behalf was made until the altercation between Ramey and the FTA over Ramey's payment of delinquent dues, had arisen.[5]

Admittedly, there had been no union shop election as provided for in the Act, and the respondent Union

---

[4]The complaint does not specifically allege the "attempt to cause" but inasmuch as "causing" implies an "attempt to cause" it is considered that the complaint is sufficiently broad to ground finding on the "attempt to cause" regardless of whether or not it be found that the discrimination actually occurred.

---

[5]Crow's testimony as a witness for the FTA was at variance with Hamilton's, but Crow was not an impressive witness and in all instances where his testimony conflicts with Hamilton's I have credited the latter.

therefore had no license to require Ramey's discharge because of his failure to maintain membership in good standing in the FTA. Its action in instigating a work stoppage in order to force the respondent Company to discharge Ramey was an "attempt to cause" the Company to discriminate against Ramey within the meaning of Section 8 (b) (2) of the Act, and the respondent Union thereby restrained and coerced the employees of the respondent Company within the meaning of Section 8 (b) (1) (A) of the Act.

I am unable, however, to find that the respondent Company discharged Ramey. Hamilton refused every demand made on him by representatives of the FTA to discharge Ramey and to reinstate Yokas in his place. He sent Ramey home on Saturday when the first work stoppage occurred but paid him for a full day's work, and told him that he hoped that it could be arranged for him to return to his job on the following Monday. In the interim he did what was normal and reasonable under the circumstance; i.e., attempted to get Ramey and the FTA to reconcile their differences in order that Ramey might resume his employment without further complications. When Ramey returned on the following Monday, and the packers again refused to work, Ramey left because he didn't "want to cause any trouble." When a representative of the charging Union, who had accompanied Ramey to the Company's packing shed on this occasion, asked Hamilton, "Is this man fired or discharged?" Hamilton replied, "He was neither."

This is not to say that Ramey voluntarily gave up his employment with the Respondent. Obviously, he did not. But his involuntary relinquishment of his job resulted not from any act of the respondent Company but from the coercive action of the respondent Union in promoting a work stoppage which made his retention of his job untenable.

I am aware that an employer who has himself engaged in unfair labor practices and by his own unlawful conduct has incited or encouraged hostility among his employees against one of their own number because of the latter's union affiliation or lack of it, owes a duty to that employee to enforce such discipline as is required to enable him to enjoy normal working conditions, but the respondent Company had engaged in no such unlawful conduct; on the contrary, it resisted every effort of the respondent Union to require it to effectuate an unlawful discharge. If Ramey had not volunteered to leave his employment rather than cause trouble, but had stood on his right to remain unmolested at his job, and the respondent Company had required him to leave or had refused to afford him such protection as was necessary to secure him in that right, a different situation might be presented, though it is difficult to see what the Company could have done short of closing down its plant. We do not have that situation, and in the situation that is presented by the facts of this case, it would seem to be an unwarranted and artificial concept of the Act's application to hold that the respondent Company interfered with, restrained and coerced its employees in the

exercise of the rights guaranteed by the Act. Nor does it appear to me that it would be in the public interest, or necessary in order to effectuate the policies of the Act, to require this Company to pay back pay, or any part of it, to an employee whose job was rendered untenable, not by its action but by action instigated and prosecuted by the respondent Union. Accordingly, I shall recommend that the complaint be dismissed insofar as it alleges that the Company engaged in unfair labor practices.

IV. The effect of the unfair labor practices upon commerce

The activities of the respondent Union set forth in Section III, above, occurring in connection with the operations of the Company, described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Ramey having involuntarily left his employment with the Company because of restraint and coercion by the respondent Union, it will be recommended that the respondent Union notify Ramey and the Company that it has withdrawn its objection to the employment of Ramey by the Company, and make Ramey whole for any loss of pay he may have suffered by reason of the respondent Union's unlawful acts in causing him to leave his employment with

the Company, by payment to him of a sum of money equal to that which he normally would have earned as wages in the employment of the Company from August 6, 1950, to the date on which the respondent Union serves the notices aforesaid, less his net earnings,[6] if any, during such period. The back pay shall be computed in the manner established by the Board in F. W. Woolworth Company.[7]

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Pappas and Company is an employer engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act.

2. Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, the respondent Union herein, is a labor organization within the meaning of Section 2 (5) of the Act.

3. By attempting to cause Pappas and Company to discriminate against Virgil Ramey in violation of Section 8 (a) (3) of the Act, the respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

4. By restraining and coercing employees of Pappas and Company in the exercise of their rights

---

[6]Crossett Lumber Co., 8 NLRB 440, 497-98.

---

[7]90 NLRB No. 41.

under Section 7 of the Act, the respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

6. The respondent Company did not discriminate in regard to the hire and tenure of employment of Virgil Ramey, and did not interfere with, restrain and coerce its employees in the exercise of their rights under Section 7 of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, the undersigned recommends that Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, its officers, and agents shall:

1. Cease and desist from:

(a) Restraining or coercing employees of Pappas and Company, its successors or assigns, in the exercise of their rights protected by Section 7 of the Act, except to the extent that such right may be effected by a valid agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act;

(b) Causing or attempting to cause Pappas and

Company to discriminate against Virgil Ramey or any other employee, in violation of Section 8 (a) (3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Notify Virgil Ramey and Pappas and Company in writing that it has withdrawn its objection to the employment of Ramey;

(b) Make Ramey whole for any loss of pay he may have suffered because of the respondent Union's restraint and coercion and attempt to cause Pappas and Company to discriminate against him, in the manner prescribed in Section V, above, entitled "The remedy";

(c) Post at its business office and wherever notices to its members are customarily posted, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director of the Twentieth Region (San Francisco, California), shall be duly signed by a representative of the respondent Union, immediately upon receipt thereof, and shall be promptly posted and maintained by it for a period of at least sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the respondent Union to insure that such notices are not altered, defaced, or covered by other material;

(d) Notify the Regional Director for the Twentieth Region in writing within twenty (20) days from the date of receipt of this Intermediate Re-

port and Recommended Order what steps the respondent Union has taken to comply therewith.

It is further recommended that, unless the respondent Union shall within twenty (20) days from the receipt of this Intermediate Report and Recommended Order notify said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent Union to take the action aforesaid.

It is recommended that the complaint be dismissed as to the Company.

Dated this 5th day of March, 1951.

/s/ WILLIAM E. SPENCER,
Trial Examiner.

Appendix A

Notice

To All Members of Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, and to All Employees of Pappas and Company:

Pursuant to

The Recommendations of a Trial Examiner

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We Will Not cause or attempt to cause Pappas and Company to discriminate against Virgil Ramey or any other employee, in violation of Section 8 (a) (3) of the Act.

We Will Not restrain or coerce any employee of Pappas and Company in the exercise of rights protected by Section 7 of the Act, except in accordance with the provisions of Section 8 (a) (3) of the Act.

We Will Make Virgil Ramey whole for any loss of earnings sustained by reason of the attempt to cause Pappas and Company to discriminate against him.

Dated .....

FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78, AND FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA,

(Labor Organization)

By .....

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

National Labor Relations Board
N.L.R.B.

CMM:LK 4/4/51

Gerald A. Brown
Director, NLRB
San Francisco

Robert H. Burke & Chuck Ervin
P.O. Box 1678
El Centro, California

J. Warkentine
Mendota, California

Ken Gillie
Brawley, California

Re: Pappas and Company, 20-CA-493 and 20-CB-159, Date for Receipt of Exceptions and Briefs in Washington Is Extended to April 16, 1951.

NATIONAL LABOR
RELATIONS BOARD

Before the National Labor Relations Board
Case No. 20-CA-439

April 15, 1951.

[Title of Causes]

Fresh Fruit and Vegetable Workers Union Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America,[1]

EXCEPTIONS TO INTERMEDIATE REPORT OF THE GENERAL COUNCIL AND RECOMMENDED ORDER

The Respondent Union takes exception to the Intermediate Report of the General Council in its entirety, with respect to the testimony referred to, the testimony itself and numerous observations of the General Council in this case.

The Respondent Union contends that the material used in the observations of the General Council, lends credence only to testimony which is incidental and irrelevant to the issues at hand. The Respondent Union does not have copy of the transcript of the hearing proceedings, therefore the Intermediate report and the attached affidavit of Chuck Feller, will serve as the basis of this brief.

The affidavit of Chuck Feller indeed supports the testimony of Mr. Crow, who was the Shop Steward at the Company's operations. The Intermediate Report of the General Council rightfully states that Crow's testimony was at variance with Hamilton's. It further says that Crow's testimony was not im-

[1]Hereinafter referred to as the Respondent Union.

pressive; while, it says, the testimony of Hamilton and Ramey is credible. The Respondent Union resents the obvious implication in the Intermediate Report that the testimony of Crow was incredible.

The Respondent Union feels that the entire issue was closed, with the reinstatement of Yokus, which action would quite naturally result in the discontinuation of Ramey's employment. It has been clearly established that Ramey replaced Yokus and performed his exact job after Yokus was unjustly discharged, and in reinstating Yokus, he was placed back to his same job.

The Respondent Union wishes to point out that at no time has the Pappas Company made any allegations towards the Respondent Union on the matter. That the so-called work stoppage was of a few minutes duration, and in effect wasn't a work stoppage at all, but was a reflection of the feeling of other crew members. This is in itself testimony of the interest shown by the workers who strongly felt that if there ever was an unjust discharge, then this was it. Action by Hamilton against Mr. Yokus was a profound violation of principle, and a direct threat to the job security of every other worker under the employ of the Pappas Company.

The Respondent Union doesn't think that the few shifts which Ramey put in, allows any consideration as to reinstatement or seniority rights, as we can find no evidence whereby Ramey had ever worked for the Pappas Company prior to this incident, we feel that it is clearly established by Feller's affidavit, that he had no rights to the job at the time.

The Respondent Union thinks it would be wrong to compel the Pappas Company to give employment to Ramey, on the basis of the facts submitted. Since Mr. Yokus did leave the employ of the Company voluntarily, subsequent to his reinstatement, then the Pappas Company should be allowed to fill the vacancy at the start of the 1951 season in such manner as the Company may desire.

The Respondent Union feels that any consideration of an unfair labor practice on the part of the Respondent Union, or the Company, would be a gross stretch of imagination with respect to this particular case. On the other hand, it could be construed that Hamilton, the foreman, was guilty of unfair labor practices, not only by his bias to the Respondent Union but by his support and condolence of Ramey's actions throughout. The Respondent Union, having had remarkably good relations with the Pappas Company for some eight consecutive years and with the evidence strongly showing that Hamilton was acting independently of the Company's desires does not hereby make issue with the Pappas Company.

That Ramey did subsequently obtain employment with one or more other companies who were operating under the same Master Agreement with the Respondent Union, and was unmolested or in any way interfered with on such job is clear evidence that no discriminatory measures were taken against him by the Respondent Union.

In conclusion, the Respondent Union wishes to

re-emphasize the fact that the Intermediate Report is based upon testimony given by Hamilton and Ramey, which dealt only with argumentative conversation, which came as an aftermath of the real issue, "The Reinstatement of James Yokus, to his Rightful Job."

/s/ CHUCK ERVIN,
Chairman.

Affidavit

Re: Case No. 20-CA-493 & Case No. 20-CB-159.

I have read the Intermediate Report and Recommended Order of the above-mentioned Cases.

I was serving in the capacity of Business Agent for the Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America during the period the above-named case took place.

On August 2, 1950, the Shop Steward on the Pappas Packing Shed in Mendota, California, reported a grievance to me, on the Packing Shed. This particular grievance was presented to me as a discharge grievance, by Mr. Crow, Shop Steward. It has always been the Union's policy for the Shop Stewards to immediately report serious grievances directly to the Business Agents of the Union, provided said grievance could not be settled by an initial effort by the Steward.

Myself and Duke Cunningham, another Business Agent, went to the Pappas Shed the following day, Aug. 3, for the purpose of making an investigation

into the grievance. We found that one James Yokus had been discharged and was replaced by another worker, who, later, proved to be Virgil Ramey. The Shed foreman, Theron (Ham) Hamilton, would not give us the name of Ramey when we requested that information. Hamilton said Yokus was discharged for allowing a piece of lumber or a board to fall into the incline, which conveys the melons up into the processing shed. Hamilton said that this was the second time this had happened during the current season, and that Yokus was told after the first incident that if it happened again he, Yokus, would be fired.

At this point, myself and Cunningham made an investigation of the equipment with respect to the boards, which had fallen onto the incline. I barely touched one of the boards, which can more accurately be described as "sticks," and it dislodged and fell onto the conveyor. As a result of our findings we took the only position we could take: that the Company was using faulty equipment, and that the incident was no fault of Yokus. We informed Hamilton that Yokus was not discharged for just cause in our opinion, and we requested that Yokus be reinstated to his job. This request was refused by Hamilton, and he said he would quit as foreman before he would reinstate Yokus; at this point Hamilton went into a tirade of attacks upon our Union. I wish to emphasize the fact that our Union had a valid Contract with the Company containing grievance procedure, seniority provisions and "discharge for cause" clause.

Our investigation then led to Mr. Yokus, who was unemployed and awaiting the Union's handling of his case. Mr. Yokus told us that after the first incident he had suggested to Hamilton that the boards be attached with ropes or chains, so that when they would fall they would be prevented from going into the machinery. This helpful suggestion was shunned by Hamilton, and no effort was made to correct the faulty equipment. Yokus pointed out that great pressure was applied to the boards when the melons were dumped into the bins; the boards were the only means for keeping all the melons from going onto the conveyor at the same time. Yokus' job was to attend to the boards, about eight in all, covering the length of the bins. Yokus also pointed out that these boards had been used for several seasons and were worn, warped, cracked, etc.

Further investigation led us to get information on the worker who replaced Yokus. We found that his name was Ramey, and that he was a supporter of the opposing Union (CIO), as well as a personal friend of Hamilton. We found that he hadn't ever previously worked for the Pappas Company. To corroborate our findings we checked the Union's Master records in the Fresno Office, and although there were more than one "Ramey," none had paid dues to our Union since the CIO raid commenced early in 1950.

The next day, Aug. 4, Mr. Cunningham and I went to the Pappas Shed with the added information, and spent considerable time discussing the issue with Hamilton, whose position was unchanged

with respect to reinstating Yokus. I again requested the initials of Ramey and Hamilton again refused that information.

The following day, Sat., Aug. 5, Cunningham and I went to the Shed to discuss the grievance with Mr. Crow, the Shop Steward, and other members of the crew. I personally went out to talk to Ramey; I asked his full name for the record; he refused to give his name and, instead, threatened to "beat the h.... out of me." I went back onto the shed and reported my experiences with Ramey to Crow. Other interested packers began coming up to hear the discussion as they were by this time quite interested in this case. The result was soon nearly all of the packers were involved in the discussion and quite naturally production had ceased. No work stoppage was called by the Union. Then Mr. Geo. Pappas appeared. I personally explained the case to him. I gave a statement of position of the Union: "That Mr. Yokus was unlawfully discharged and that the Union requests his reinstatement." I advised Mr. Pappas that in the opinion of the Union, if this case were to run its course, the Company would be required to reinstate Yokus and pay him for loss of earnings. I told of Ramey's threat to do bodily harm to me.

Mr. Pappas' position was that he wanted no trouble and that if Ramey was a trouble maker, he didn't want to employ him. Pappas stated that he personally knew Mr. Yokus, who had worked previous seasons for him and that his work was always satisfactory, and that he couldn't understand

why he had been fired. At this time Hamilton took an opposite position and considerable argument took place.

About this time Ramey made his appearance; he began telling what a good union man he was, etc. This is when Mr. Cunningham and Ramey began to argue about dues standing. This incidental argument only appears to have been used in the testimony of Ramey and Hamilton, according to the Intermediate Report of the General Council.

It was known that other workers on the Pappas Shed were delinquent with their dues, yet the Union took no sanctions against them. The Union was aware that no Union Shop clause was affected by the Contract. Cunningham and Ramey engaged into considerable argument about dues standings, etc. But at no time was the question of dues standing the issue. Ramey then said he would "knock the h.... out of about fourteen of you guys," meaning the packers and Business Agents. This antagonized the packers who began agreeing among themselves that they would not work on the same job with Ramey. The foreman, Hamilton, made no effort whatsoever to alter Ramey's threats.

The next Morning, Sunday, Aug. 6 (the Pappas shed didn't operate that day), I was awakened by two men, Ken Gillie and one Crabtree, who presented themselves as CIO representatives. Their visit was most unfriendly. They said they had just come from Mr. Hamilton's house and that Ramey was going to be kept on the job in place of Yokus.

The CIO representatives were on the Shed the

next morning, along with Ramey. The packers took the position that they would not work while the CIO representatives were on the shed, since the FTA Union had contractural relations with the Company. Mr. Yokus was then reinstated to his former job and remained there toward the end of the season. I do not know why he eventually quit his job, but he had every right to do so. No grievance was made when he quit.

To my own knowledge and reference to my daily reports, this is an accurate accounting of the events which took place with respect to the above-named Cases.

/s/ CHAS. J. (CHUCK) FELLER.

State of California,
County of Imperial—ss.

On This 16th day of April, A.D. 1951, before me, S. Aluescu, a Notary Public in and for said County and State, personally appeared Chas. J. (Chuck) Feller, known to me to be the person whose name ..... subscribed to the within Instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ S. ALUESCU,
Notary Public in and for Said County and State.

My Commission Expires Jan. 31, 1954.

Received April 18, 1951.

April 18, 1951.

Mr. Chuck Ervin

Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America

P. O. Box 1678
El Centro, California

Re: Pappas and Company, Cases Nos. 20-CA-493 and 20-CB-159.

Dear Sir:

This is to notify you that the Board will not consider your exceptions to the Intermediate Report in this matter for the following reasons:

1. The exceptions are untimely. They were due originally on March 28, 1951. The time for receipt of the exceptions was extended to April 4, 1951, and later to April 14, 1951. No further extensions were granted. Your exceptions, received by the Board on April 18, were too late. See The Ann Arbor Press, 91 NLRB, No. 202, and W. Hawley and Company, 93 NLRB, No. 137.

2. Moreover, your exceptions failed to conform with requirements of Section 102.46 of the Rules and Regulations which specify that exceptions and briefs shall designate by precise citation of page and line the portions of the record relied upon.

3. Moreover, your exceptions are based at least in part upon an affidavit (attached to your excep-

tions) which is not part of the record in the case.

Very truly yours,

FRANK M. KLEILER,
Executive Secretary.

cc: Mr. Warkentine
Mr. Magor
Mr. Gillie
Mr. Rissman

Before the National Labor Relations Board
Twentieth Region

Case No. 20-CA-493

In the Matter of:

PAPPAS AND COMPANY

and

UNITED FRESH FRUIT AND VEGETABLE WORKERS LOCAL INDUSTRIAL UNION 78, C.I.O.

Case No. 20-CB-159

In the Matter of:

FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78, AND FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA

and

UNITED FRESH FRUIT AND VEGETABLE WORKERS LOCAL INDUSTRIAL UNION 78, C.I.O.

PROCEEDINGS

Civil Service Examination Room, United States Post Office, El Centro, California, Thursday, February 8, 1951.

Pursuant to Notice, the Above-Entitled Matter Came on for Hearing at 10:00 A.M.

Before: William E. Spencer, Trial Examiner.

Appearances:

ROBERT V. MAGOR,

512 Pacific Building,
821 Market Street,
San Francisco, California,

Appearing as Counsel for the General Counsel.

J. WARKENTINE,
Mendota, California,

Appearing on behalf of Pappas and Company.

KEN GILLIE,
Brawley, California,

Appearing on behalf of United Fresh Fruit and Vegetable Workers Union,

Local Industrial Union 78, C.I.O.

CHUCK ERVIN,
Box 1678, El Centro, California,

ROBERT H. BURKE,
El Centro, California,

Appearing on behalf of Fresh Fruit and Vegetable Workers Union Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America.

* * *

Mr. Magor: At this time, Mr. Trial Examiner, I would like to have marked for identification purposes, all the formal documents in this case. The original charge in Case No. 20-CB-159, filed on 9/1/50 we will mark for identification purposes General Counsel's 1-A. The affidavit of service of the original charge, with the return post office receipt attached thereto, will be marked for identification purposes as General Counsel's 1-B. The original charge in Case No. 20-CA-493, filed on 9/1/50, will be marked for identification purposes as General Counsel's Exhibit 1-C. The affidavit of service of the original charge in Case No. 20-CA-493, will be marked for identification purposes at General Counsel's Exhibit 1-D. The first amended charge in 20-CB-159, filed on 11-20-50, will be marked for identification purposes, as General Counsel's Exhibit 1-E. The affidavit of service of copy of the first amended charge of 20-CB-159, with the return post office receipts attached thereto, will be marked for identification purposes as General Counsel's Exhibit 1-F. The first amended charge in case No. 20-CA-493, filed on 11/28/50, will be marked for identifi-

cation purposes, as General Counsel's Exhibit 1-G. The affidavit of service of copy of the first amended charge in Case No. 20-CA-493, with return post office receipt attached thereto, will be marked [6*] for identification purposes as General Counsel's Exhibit 1-H. The consolidated complaint, to which is attached a copy of the first amended charges, Case 20-CA-493, and Case No. 20-CB-159, issued on the 30th day of November, 1950, will be marked for identification purposes, as General Counsel's Exhibit 1-I. The order consolidating cases, and the notice of Consolidated Hearing, issued on the 30th of November, 1950, will be marked for identifiation purposes, as General Counsel's Exhibit 1-J. The affidavit of service of the Order Consolidating cases, and Notice of Consolidated hearing, consolidated complaint, and first amended charges, to which is attached the return post office receipts, will be marked for identification purposes, as General Counsel's Exhibit 1-K. The affidavit of service of a telegram changing the location and time of the hearing will be marked for identification purposes, as General Counsel's Exhibit 1-L. The confirmation copy of said telegram, which shows upon it the addressees, referred to in General Counsel's Exhibit 1-L, will be marked for identification purposes, as General Counsel's Exhibit 1-M. The affidavit of service of a telegram changing the time and location of the hearing, addressed to the United Fresh Fruit and Vegetable Workers, Local Industrial

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Union 78, C.I.O., and Robert R. Rissman, 257 South Spring Street, Los Angeles, California, will be marked for identification purposes, as General Counsel's Exhibit 1-N. Confirmation copy of said telegram, showing [7] the addressees, referred to in General Counsel's Exhibit 1-N, will be marked for identification purposes as General Counsel's Exhibit 1-O. The affidavit of service of telegram sent to Charles Law, post office box 1678, El Centro, California, will be marked for identification purposes as General Counsel's Exhibit 1-P. The confirmation copy of said telegram to Charles Law, will be marked for identification purposes as General Counsel's Exhibit 1-Q.

May I take just a short recess for a moment?

(Thereupon the documents referred to were marked as General Counsel's Exhibits 1-A through 1-Q, for identification.) [8]

* * *

Trial Examiner Spencer: The exhibits are received as offered by the General Counsel.

(The documents heretofore marked General Counsel's Exhibits 1-A to 1-Q for identification, were received in evidence.) [9]

* * *

JOHN WARKENTINE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Magor:

Q. Will you state your name and address for the record?

A. My name is John Warkentine, from Mendota, California, and the record I play there would be office manager.

Q. You say you are office manager. Who are you office manager for?

A. For Pappas and Company, Mendota.

Q. This case being brought, with Pappas and Company as Respondent, is that the correct and true name of the company?

A. That is the true name of the company.

Q. How long have you been office manager for Pappas and Company? A. About four years.

Q. Can you tell me what type of a company it is. Whether [10] it is a partnership, a corporation, or an individual enterprise?

A. It is a California corporation.

Q. Who are the officers?

A. George Pappas, Gus Kavalos and Fay Fearon.

Q. What office does each of those individuals hold? Do you know?

A. Mr. Pappas is the president, and Gus Kava-

(Testimony of John Warkentine.)

los is I think the treasurer—no, I think the vice president, and Mrs. Fearon is the treasurer.

Q. Who are the stockholders of that corporation?

A. Those three are the stockholders.

Q. By those three, do you mean the individuals you previously testified to, is that correct?

A. Yes.

Q. What is Pappas and Company engaged in? What type of business?

A. They are engaged in farming, they grow melons, cotton and grain. We do have onions now.

Q. Are they engaged in any other business? Besides farming? A. No.

Q. Do they operate a packing shed?

A. Yes, they do.

Q. Where are the farm lands of the company?

A. The farm lands of the company are approximately between [11] six and nine miles southwest of the city of Mendota, Fresno County.

Q. And where is the packing shed of the company?

A. The packing shed is located in the City of Mendota.

Q. The city of Mendota, and the farm lands would be six to nine miles from the packing shed, is that correct? Is there any farm land around the packing shed itself? A. That they own?

Q. That they own. A. No.

Q. In other words, the packing shed is right in the city of Mendota? A. That is right.

(Testimony of John Warkentine.)

Q. Approximately how many acres are farmed by Pappas and Company?

A. Roughly around 3,500.

Q. And what products are grown on the farms of Pappas and Company?

A. We grow cotton, melons and grain.

Q. Cotton, melons and grain?

A. Those are the main crops.

Q. What products are packed through the packing shed of the company? A. Melons.

Q. No cotton or grain goes through the packing shed, is that correct? [12] A. No.

Q. Can you tell me approximately how many acres are used for growing melons by the company?

A. Roughly around seven or eight hundred acres.

Q. About seven or eight hundred acres. Can you tell me approximately the value of the farm lands of Pappas and Company?

A. It should be worth in the neighborhood of two hundred thousand, maybe better.

Q. Can you tell me approximately the value of the packing shed of the company?

A. Around twenty-five thousand.

Q. Were any improvements added to the packing shed during the year 1949 or 50? A. Yes.

Q. And what improvements were added to that?

A. Well, electrical improvements, and in the sorting and stuff like that, there were some improvements made.

Q. Approximately what amount of money was expended for improvements and betterments?

(Testimony of John Warkentine.)

A. I should say about $2,500.

Q. Then the value of the packing shed is about $25,000? A. Yes.

Q. Does that include the shed itself? Or does that include the equipment? [13]

A. That includes all the equipment.

Q. Approximately what amount of money would you estimate? A. About $10,000.

Q. Is there a spur track near the packing shed of the company? A. Yes, there is.

Q. By whom was the spur track built?

A. It was built by the S.P., but paid for by Pappas and Company.

Q. You say the S. P. Would you identify the S. P.? A. Southern Pacific Railroad.

Q. What was the approximate cost of that spur track? A. Around $3,000.

Q. Are there any employees employed on the farm lands or the ranch of the company the year around? A. Yes.

Q. Approximately how many employees are employed? A. I would say roughtly about 25.

Q. About 25. When are cotton, grains and melons grown on the farm lands? When does the season begin for planting?

A. Well, the grains naturally start in the fall of the year, whereas the melons and the cotton would start the latter part of March and April.

Q. That is the planting of the melons and cotton in March and April? [14] A. That is right.

(Testimony of John Warkentine.)

Q. The grain is in the fall?

A. That is right.

Q. What do you mean by that? September?

A. Not September. I would say from November on.

Q. From November on. What is the peak of the amount of all employees employed on the ranch?

A. Well, the peak would be roughly during the melon season which starts about the middle of July.

Q. About the middle of July. How many employees are employed on the ranch during the peak?

A. I would say roughly about 75.

Q. About 75 employees. Tell me exactly what the Company does in the growing of melons.

A. Will you explain just a little?

Q. Strike that. During the peak you employ about 75 employees, now are those employees of Pappas and Company?

A. Well, you take—there is a certain amount of labor there furnished by a contractor.

Q. You say a certain amount of labor is furnished by a contractor? A. That is right.

Q. When does this contractor furnish labor? Is that during the peak season?

A. That is during the peak season, yes. [15]

Q. You say during the peak the contractor furnishes some employees, is that correct?

A. That is right.

Q. And that is when you are growing melons? And what work is done by the contractor?

A. Well, the contractor, he does the hoeing,

(Testimony of John Warkentine.)

thinning, and cutting weeds, and maybe help in irrigation or something like that, a few of the men——

Q. He does the hoeing and thinning, is that it? Who does the picking of the melons?

A. He does the picking of the melons, too.

Q. The picking of the melons is done by the employees? A. That is right.

Q. Is that a verbal or written contract?

A. That is a verbal contract.

Q. You speak of 75 employees about that time —did you say about 75? A. That is right.

Q. Does that include the 25 you say work there the year round?

A. No, in most cases that would be in addition.

Q. That would be in addition to the 25, is that correct? A. Yes.

Q. Then the 70 or 75 employees are employed by the contractor, or are they employed by Pappas and Company? [16]

A. They are employed by the contractor.

Q. How is the contractor paid for his work?

A. The contractor himself is paid by the day, whereas his help is paid by the hour.

Q. Do you make any payment to his help, or Pappas and Company? A. No.

Q. In other words, you pay the contractor and the contractor in turn pays his employees, is that correct? A. That is true.

Q. And they do the actual picking of the melons in the field, is that correct?

(Testimony of John Warkentine.)

A. That is correct.

Q. During that period of time what do those 25 employees employed on the ranch do?

A. Well, we have got quite a few tractors—there is tractor work, irrigation, which never stops.

Q. Do you keep any payroll records of the contractor's employees?

A. Well, yes, naturally I check on his help, whatever he takes out there, to make sure that he don't slip up on something for the men under him.

Q. Do you keep payroll records of each man who is employed by the contractor?

A. No, we don't. [17]

Q. What do you mean by checking up?

A. Well, just how many men he furnishes for a day under that.

Q. Who does the hiring and firing of those men?

A. The contractor does, with the men.

Q. The contractor himself does, is that correct?

A. Yes.

Q. When does the packing shed begin its operations? A. The middle of July.

Q. And when does it conclude its operation in packing melons?

A. Roughly about the middle or last of October.

Q. During the time when the packing shed is operating, what is done by the officers of the corporation? Do they spend any time in the shed or on the ranch? Can you explain that?

A. Yes. They are in both places, for that matter. Mr. Pappas he is in the shed the most of the time.

(Testimony of John Warkentine.)

Q. About what percentage of his time does he spend in the shed?

A. Well, I would say 75%.

Q. How about Mr. Kavalos?

A. He spends very little time in the shed; he comes in to report, but he is in the field.

Q. He spends his time at the farm lands of the company? A. That's right.

Q. And Mr. Kavalos spends much of his time in the packing shed, is that right? [18]

A. Mr. Pappas.

Q. Mr. Pappas—pardon me. How about this Fay Fearon, does she spend any time in the——

A. No, she don't spend any time there.

Q. Either at the shed or at the farm?

A. That is right, no.

Q. Who manages the shed when it is in operation?

A. When the shed is in operation we have a man there by the name of Hamilton. T. H. Hamilton.

Q. What is T. H. Hamilton's business or occupation with the company?

A. He is the shed foreman.

Q. Is Hamilton known by any other name than T. H. Hamilton?

A. Well, they call him Ham Hamilton, a good deal.

Q. Is he commonly known as Ham?

A. That is right, commonly known as Ham.

Q. What employees are employed in the shed

(Testimony of John Warkentine.)

when it is in operation? The packing shed—what classifications?

A. Well, we have packers, sorters, truckers, lidders—that would just about cover it.

Q. Who assigns the individual employees in the packing shed to those respective classifications?

A. Well, Hamilton does that.

Q. That is the foreman of the shed?

A. That is right. [19]

Q. Does Mr. Hamilton exercise any authority over the employees, working on the ranch during the packing season?

A. Well, it would be small. He might contact the pickers once in a while, but that would be all—the picking contractor.

Q. He would see the picking contractor, is that right? A. Yes.

Q. Does Ham Hamilton have the authority to hire and fire employees? A. Yes, sir.

Q. During the year of 1950 and specifically the packing season of 1950 was Ham Hamilton the shed foreman? A. Yes, sir.

Q. Does the company's command, by that I mean Kavalos, Pappas, or Ham Hamilton, hire or fire or direct the work of any of the contractor's men in the field? A. Oh, yes.

Q. Who do they see? Do they see the contractor, or do they see the men?

A. They see the contractor.

Mr. Magor: Mr. Reporter, will you read the question?

(Record read.)

(Testimony of John Warkentine.)

The Witness: Oh, the contractor's men—no, he don't direct any of the contractor's men, if that is the way that is to be.

Q. (By Mr. Magor): Neither Pappas, Kavalos or Hamilton? A. No. [20]

Q. They see the contractor himself, is that correct? A. That is correct.

Q. Now, how are the melons brought to the packing shed? A. By truck and trailer.

Q. By trucks and trailers?

A. The trucks and trailers, the way we have been operating for the last two years, have been owned by the Vegetable Harvesting Company.

Q. Is that an independent company?

A. That is right.

Q. Where are they located?

A. San Bernardino.

Q. Do you buy the tractors, or do you rent them?

A. We rent them.

Q. Who employs the truck drivers?

A. We do, Pappas and Company?

Q. Do you pay the truck drivers yourselves?

A. That is right.

Q. They are kept on the payrolls of the company? A. Yes.

Q. Approximately how many employees do you employ in the packing shed during the packing season?

A. I would say roughly around 60, maybe a few more.

(Testimony of John Warkentine.)

Q. About 60. And when is the peak reached in the packing shed? [21]

A. Well, common the peak would be right roughly in about August.

Q. About August. Now, Mr. Warkentine, if I understand your testimony correctly, the only products, that are packed by the company are the melons. Is that correct? A. That is right.

Q. Can you briefly explain for me just what is done with the melons from the time it reaches the shed until it is packed—the operation of the company at the packing shed?

A. Well, when the melons reach the shed in these trailers, they are then unhitched and they have got what they call a little tractor there and they pull the trailers to the unloading point there and then the side is opened and the melons roll onto a conveyor belt which conveys them into the shed to the sorters; from the sorters it goes to the packers, and from the packers to the lidding machine and down the conveyor and they are taken off the conveyor there, and the lidders and truckers pick it up and load.

Q. You say it comes into the sorters. What do the sorters do with the melons?

A. They sort the melons, and if there is any bad ones on the table there, they are culled out.

Q. And then they are delivered to the packers; what do the packers do?

A. They pack the melons in the crates. [22]

Q. And what is done after it is put in a crate?

A. It is put on a conveyor and goes to the lidder.

(Testimony of John Warkentine.)

Q. And the lid is put on the crate, is that co
rect? A. That is right.

Q. What type of melons do you run through t
shed?

A. We run cantaloupes and Persian melons [2
through.

Q. Is there any washing done on the melons
all? A. No. No washing.

Q. Anything done to the melons? A. N

* * *

Q. Approximately what was paid the Union I
Company for icing railroad cars? During the ye
1949? A. Around $10,000.

Q. Was that paid by Pappas and Company?

A. That was paid by Pappas and Company.

Q. Where are the railroad cars iced?

A. Some of the cars are iced right at the she
but now and again they are pulled out to the tea
track and iced on the team track.

Q. Where is the team track located—how f
from the shed?

A. I would say maybe 100 or 200 yards.

* * *

Q. What was the value of the melons sold duri
the year 1949? Approximately?

A. Approximately between four hundred a
four hundred and fifty thousand dollars. [24]

Q. Of that four hundred or four hundred fif
thousand dollars, what percentage was shipped
Pappas and Company to places outside the State
California?

A. Well, offhand, I would say 75 per cent,
maybe a little higher. [25]

* * *

(Testimony of John Warkentine.)

Q. Does the company make any purchase of melons from any other grower? A. No.

Q. They receive their melons only from the land that is owned by them, is that right?

A. That is right.

* * *

Q. For the purpose of the record, can you tell me size of the packing shed is?

A. It is 60x200.

Q. Can you tell me what type of equipment is used in the packing shed?

A. It is all electrified equipment.

Q. Would you explain what equipment you use?

A. Well, it consists of conveyors, belting, rollers, lidding machines, crate racks, bins, elevators——

* * *

VIRGIL RAMEY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Magor:

Q. Would you state your name for the record, please.

A. Virgil Ramey, 276 "A" Street, Brawley.

Q. What is your business or occupation?

A. I work for the Richman, Justman, Frankenthal Company, at Brawley.

Q. Where is that—Brawley? Is that a city in California? A. Yes, sir.

Q. Were you ever employed by Pappas and Company? A. Yes, sir.

Q. When were you first employed by that company? A. In August, the 2d of August, 1950.

(Testimony of Virgil Ramey.)

Q. And at the time you were employed by Pappas and Company, where were you employed?

A. I was dumping trailers.

Q. Where? A. Up in Mendota.

Q. In Mendota. Is that the packing shed of the company? A. Yes.

Q. When you were first employed by the company, who employed you? [28]

A. Mr. Hamilton. Ham Hamilton.

Q. Ham Hamilton? The shed foreman for Pappas and Company? A. Yes.

Q. What did Mr. Hamilton have to say to you when he first employed you?

A. He said he needed a man to dump melons, and wanted to know if I would like to do that until the other work started. I told him I would be glad to. He told me to come out that evening and go to work.

Q. You were dumping melons when you were first hired on August 2, 1950? A. Yes.

Q. Where, with reference to the packing shed, were you working? A. It was outside.

Q. What do you mean by outside?

A. Well, they bring the trailers up to that particular point on the outside of the shed where they roll them off up an incline to go to the sorters.

Q. You were outside the shed, is that correct?

A. Well, it is part of the shed—it is in the open. It is not in the shed.

Q. Were you a member of any labor organization

(Testimony of Virgil Ramey.)

when you went to work for Pappas and Company?

A. Yes, sir. [29]

Q. What labor organization were you a member of? A. F. T. A.

Q. How long had you been a member of the F.T.A., to the best of your recollection?

A. Oh, about eight or ten years.

Q. At the time that you went to work for Pappas and Company had you paid your dues to the F.T.A.?

A. I was paid at the time, but I was delinquent at the time.

Q. How many months or how long had you been delinquent?

A. Well, possibly six months, two quarters.

* * *

Q. (By Mr. Magor): What were the positions of Chuck Feller and Duke Cunningham, in August, 1950, with the FTA?

Mr. Ervin: They were organizers and business agents.

Mr. Magor: Organizers and business agents—is that for the Fresh Fruit and Vegetable Workers Union Local 78, FTA?

Mr. Ervin: Yes.

Mr. Magor: And you will so stipulate, they were organizers and business agents during the month of August, 1950?

Mr. Ervin: That is right.

Mr. Magor: I will accept the stipulation. [30]

(Testimony of Virgil Ramey.)

Q. (By Mr. Magor): Do you, Mr. Ramey, know Chuck Feller and Duke Cunningham?

A. Yes.

Q. During the time you were working for Pappas and Company did you have any conversation with either Duke Cunningham or Chuck Feller?

A. Yes, with both.

Q. When did you first have a conversation with either of those two gentlemen?

A. The first with Chuck Feller was August 4.

Q. August 4. Where were you at the time you had this conversation with Chuck Feller?

A. I was on the job.

Q. You were on the job.

A. Dumping melons.

Q. That is at Pappas and Company?

A. Yes.

Q. What time of day was it?

A. Well, it was approximately eleven o'clock in the morning. It was before lunch.

Q. Did Chuck Feller approach you or did you approach him? A. He approached me.

Q. Was anybody else present at the time?

A. Well, there was a boy driving the bug—he was going back and forth. [31]

Q. Do you know the boy's name? A. No.

Q. Can you tell me to the best of your recollection the conversation that occurred at that time? As to what Chuck Feller had to say and what you had to say?

A. Well, Chuck came up first and said, "Ramey,

(Testimony of Virgil Ramey.)

we had a book inspection the other day, that was before you started." He said, "Have you your book with you?" I said, "I am not sure I've got it, Chuck, or not, but I will look and see." He said, "You do that, and I will be back tomorrow." I said, "All right," and he turned and left.

Q. Did that conclude the conversation?

A. That concluded the first time.

Q. When was the next time you had a conversation, either with Chuck Feller or Duke Cunningham?

A. Well, the next day Mr. Cunningham came up first.

Q. That would be the day following this conversation with Chuck Feller?

A. That was the 5th.

Q. The 5th of August?

A. August 5th, when Duke Cunningham came there.

Q. Where were you at the time Duke Cunninghame came there?

A. Right on the Pappas shed, dumping melons, also. [32]

* * *

Q. (By Mr. Magor): Will you give me to the best of your recollection the conversation that occurred at that time, as to what you had to say and what Mr. Cunningham had to say?

A. Well, he just came up and said, "I am Mr. Cunningham. I am a representative of the F.T.A. and I would like to check your book." I said, "I

(Testimony of Virgil Ramey.)

haven't got my book. Chuck told me to look for it yesterday." I said, "He is coming back this morning to talk to me."

Trial Examiner Spencer: When you say "book," you mean your dues book, do you sir?

The Witness: That is right. Yes, sir. And he had a piece of paper with a list of names on it, and he looked on that paper and pretty soon he says, "Oh, yes, I see," and turned and walked away. That was the conversation.

Q. (By Mr Magor): That was all the conversation, then?

A. With him, at the time, yes. [33]

Q. Did you see him after that?

A. Inside the shop.

Q. Tell me what you did when he walked away?

A. I went back to work then.

Q. Then what occurred?

A. Then that afternoon Chuck came over.

Q. Who is Chuck? That is Chuck Feller?

A. Mr. Feller, and asked me if I had found my book. I says, "No, I didn't have it." He says, "Well, are you paid up?" I says, "No, I am delinquent." He said, "Well, it don't make any difference, a lot of the boys in the shed are that way too, they were going to pay up payday." I said, "Who all in the shed here is paying up?" So he showed me a paper with some names on it and he says, "Here is the packers, they are 100% F.T.A., they are 100% paid up now. Here is Sunny Ward, he is behind. Of

(Testimony of Virgil Ramey.)

course he is CIO and won't pay." I said, "I feel the same way he does about the FTA-CIO." He said, "It doesn't make any difference what you say as long as we get our dues." I said, "I have been hearing around here that we are not supposed to pay dues until the election is over." I said, "I don't think I will pay anybody until I hear that, and when that comes, I will pay everybody I owe every penny." He says, "Well, we have the book." I said, "All right, well, I have been told like everybody else has, not to pay anything." So he turned and walked away. [34]

Q. What occurred then?

A. Well, then I would say thirty minutes after that, everything shut down—all the machinery, and was quiet, so I asked this kid driving the bug what happened inside. He says, "I don't know. Why?" I said, "There is nothing running." He says, "Let's go see." So we both went in.

Q. Did you—where did you go when you went in? A. Inside the shop.

Q. Who was present at the time you went inside the shop?

A. Well, there was Mr. Cunningham, Mr. Feller, and of course Mr. Hamilton—was all up in a big bunch.

Q. Were the workers working?

A. No, they was all standing there.

Q. Now, will you tell me to the best of your recollection what was said at that time and who said it?

A. As soon as I got in, the first one that I met

(Testimony of Virgil Ramey.)

was Mr. Feller. He said, "Well this is the reason we called this shutdown—there is a man working outside that don't even belong to the union." So I went over and asked Chuck, "Just who do you mean is that man outside that don't belong to the union?" He said, "You." So I called him a liar. He says he was not, and I said, "Well, you are." I says, "Check your records, you can easily see whether I am union, or not." So this Mr. Cunningham spoke up and he said, "Well, we have checked the records, and we find you are union, but that you are a year and one-half [35] behind in your dues." So I called him a liar, and that was about all I had to say. It was an argument between the shop steward and Mr. Hamilton.

Q. Tell me just what was said between Hamilton and the shop steward? Who was the shop steward?

A. Mr. Crow.

Q. Crow?

A. Crow or Snow. I am not sure.

Q. What was said between them?

A. Well, they insisted that Hamilton give me my check and pay me off. He said, "No, I don't think that is right." He said, "I know that man is union." So they insisted that he pay me off or they wouldn't go back to work.

Q. Who insisted?

A. Well, the union boys. Mr. Feller, Mr. Cunningham and Mr. Crow. They said they wouldn't go back to work until he paid me off. Mr. Hamilton

(Testimony of Virgil Ramey.)

kept insisting that he didn't think it was right; that I had as much right to work as any of [36] them.

* * *

Q. Now, will you take your time and give me the rest of the conversation, that is, what was said by Mr. Cunningham, Mr. Feller, and this individual Crow or Snow, as you identify him, in your presence?

A. Well, Hamilton told him he thought I had as much right to work as anybody.

Q. Who did he tell this to? [37]

A. Well, he was talking to Mr. Feller and Cunningham, and they wouldn't take that. They said, "Well, we won't go to work until he is out of this shed." And he said——

Q. Who said what?

A. Well, they was both talking back and forth. Then Mr. Cunningham said, he said, "Well, would you be willing to put up $24.00. I can let you go on back to work and leave you alone?" I said, "Well, no, I wouldn't." I says, "In the first place, I haven't got it," but I says, "Why should I pay in a whole year's dues?" So he didn't say anything. He just as much as said, "Well, there you are." Then pretty soon most of them seemed anxious to go back to work, some of the packers, and when I thought they were going to, I decided I would go out and walked right out of the shop and then just as I was going out this shop steward said, "Well, boys," he said, "Come on, let's go on home. Hamil-

(Testimony of Virgil Ramey.)

ton isn't going to do anything about it." So at that time Mr. Pappas came over to Ham, just as I was going out and he says, "I want to talk to you." So I just continued on when he said that. I don't know what conversation they had. A little bit later the machinery started up, so I let down the trailer side and started letting the melons fall into the bin and Mr. Hamilton came up to the door.

Q. How much later was it that Hamilton came there after you had left the shed?

A. I would say maybe fifteen minutes. [38]

Q. Mr. Hamilton came to the door?

A. He walked to the door and called me up there.

Q. Was anybody else present? A. No.

Q. All right. Now state the conversation that occurred at that time between yourself and Mr. Hamilton.

A. Well, he says, "Well, Ramey," he says, "The boys refuse to go back to work until you are off the shed, so you might as well take off." He says, "I will go ahead and pay you for the rest of the day," and he said, "I hope something will develop and you will go back to work over the week end." I said, "O.K. if that is the way it is," "That is the way it has got to be," so I went out and got in my car and went to town.

Q. What time of day was that?

A. That was about in the neighborhood of four o'clock.

Q. What time did you normally work on that day if no interruption had taken place?

(Testimony of Virgil Ramey.)

A. Well, I would have possibly gone to five o'clock.

Q. After that did you have any conversation with either Mr. Cunningham, Mr. Feller or Mr. Hamilton? A. Yes, with Mr. Hamilton.

Q. When were you talking to Mr. Hamilton?

A. That was the next day, Sunday evening.

Q. Where were you talking to Mr. Hamilton at that time? A. On the street at Mendota. [39]

Mr. Burke: That was Sunday evening?

The Witness: Sunday evening.

Q. (By Mr. Magor): Where were you and Mr. Hamilton?

A. It was in Mendota, in front of the restaurant.

Q. Can you recall to the best of your recollection what time of the day it was? Sunday evening?

A. That was along, I would say, between 7:30 and 8:00 o'clock.

Q. Was anybody else present at the time?

A. No, he was by himself.

Q. Would you tell me to the best of your recollection, the conversation that occurred at that time, as to what you had to say and Mr. Hamilton had to say?

A. He asked mé if I had seen any of the FTA men. I said, "No, I don't want to." He said, "Well, why don't you go ahead and pay it and get

(Testimony of Virgil Ramey.)

it over with? That way you can come back and go to work." He said, "I know you haven't got the money"; he says, "I would be almost willing to give you that money out of my own pocket to do it." He says, "I wish you would." He says, "You are hot-headed and you didn't mean half of what you said." I said, "No, you are right, but I won't apologize; if there is something to prove I am a liar now, I won't do it." He said, "That would be easiest way just to settle it." I said, "No, I can't do it." So he got in his car and left.

Q. That is all the conversation you had?

A. That is all. [40]

Q. Did you have any conversations after that with Mr. Hamilton? A. Yes.

Q. When was this?

A. I think the next conversation was just a couple of days after that. I went out to the shed.

Q. You went out to the shed? A. Yes.

Q. Do you recall when it was you went out to the shed?

A. I just went out and talked to the carloaders, and Mr. Hamilton said, "Hello, Jack," and he said, "How are you doing?" and I said, "No good." And that is all the conversation then.

Q. Did you go out to the shed after that at all?

A. Yes, I went out one day after that when I got a job over at Murphy's and I was told to go down and see if I am still on the payroll or something like that.

Q. Prior to that time did you go out to the shed

(Testimony of Virgil Ramey.)

with any of the union representatives to see Mr. Hamilton? A. Yes.

Q. When was this that you went out there?

A. Monday morning.

Q. Monday morning. What Monday are you referring to now?

A. That was August 6, Monday. The 6th.

Q. The last day you worked, then, was on a Friday? A. Saturday. [41]

Q. Was this the following Monday?

A. The following Monday.

Q. What time of day was it you went to the shed on the following Monday?

A. We got there about seven o'clock.

Q. Seven o'clock. Who was with you at that time? A. Mr. Gillie and Mr. Crabtree.

Q. And when you say Mr. Gillie, that is the individual sitting behind me? A. Yes.

Q. Who is a representative of the CIO? Can you tell me who Crabtree is?

A. That gentleman there. He is the CIO representative.

Q. This individual sitting here—right here?

A. Yes.

Q. Do you know of your own knowledge what his position is with the CIO?

A. He is chief business agent, I guess you call it.

Q. You went out to the shed on Monday morning? A. Yes.

(Testimony of Virgil Ramey.)

Q. Tell me just what occurred when you went out to the shed at that time?

A. Well, we just walked into the shed, and, of course, I don't know if there was any other help, but some of the packers and Mr. Hamilton saw me, and as soon as we came into the shop Mr. [42] Hamilton came over to us and the packers were there in behind their dumps, putting their aprons on. It was just a couple of minutes before work time, and Mr. Hamilton says, "Let's go to work, boys." So then the packers came out from behind their dumps and took their aprons off and stood up in a bunch over there and Mr. Hamilton came over to us and he said, "Well, the boys refuse to work while you are around the shed." So I says, "I am getting off. I don't want to cause any trouble." So I turned and left the shed, and what went on after that I don't know.

Q. You left? A. I left.

Q. Were you paid on Friday for all of Friday's work day? The day you worked last?

A. Yes, I was paid for that day—for all the day.

Q. What day was that? A. Saturday.

Q. When did you normally get paid by the company?

A. I don't know whether it was Tuesdays or Wednesdays. I don't remember what the paydays were.

Q. It was not Saturday, is that correct?

A. No, I waited until payday for my check, then I went down to get it.

(Testimony of Virgil Ramey.)

Q. And what was the pay check, up to the Saturday or to the end of the pay period? [43]

A. I am not sure on that. He gave me a check, then I think I went out and I had a part of a check coming again, and I asked him for it and he gave me the cash on that, Mr. Hamilton.

Q. Were you paid for Saturday, the last day you worked? A. I was paid for that day, yes.

Q. Were you paid for any days after that?

A. No.

Q. Your normal payday was Tuesday or Wednesday? A. I think so.

Q. I believe you previously testified, when you were talking about one of those conversations, with Mr. Cunningham and Mr. Feller, that you referred to an election, "after the election was over," I believe your testimony was.

A. Yes, that is what I told Chuck. I says, "When the election is over I will pay every penny that I am behind, and which I am supposed to pay, to pay up."

Q. What election were you talking about?

A. I was talking about that National Labor Relations Board election.

Q. You were referring to the National Labor Relations Board's election? A. That is right.

Q. Had the National Labor Relations Board election been held as of that day? [44]

A. No, it had not.

* * *

(Testimony of Virgil Ramey.)

Cross-Examination

By Mr. Burke:

Q. You went to work August 2, did you say?

A. That is right.

Q. On August 2, and this occurred on August 5, is that correct? A. That is right.

Q. Now, did you know that just prior to that time you went to work a fellow named Jim King on that job had been discharged by the company?

A. I knew, yes.

Q. Did you know that he had been discharged?

A. Yes.

Q. He worked on the same job that you [45] did? A. Yes.

Q. Did you know that the union representatives had taken that grievance up as an unjust discharge?

A. No, I didn't know that.

Q. Did you know after you were discharged he was returned to work? A. Yes. [46]

* * *

Q. * * * You started to testify that you later saw Ham several days later and I wasn't quite clear as to when that was. You saw him on Saturday, the last time you worked—you were talking to him that day; then on Monday you saw him again?

A. Talking to him Sunday night.

Q. But you said, I believe, that you talked to him several days later again, that you had gone

(Testimony of Virgil Ramey.)

down to see the carloaders, or something, do you recall that?

A. Yes, I saw him out there and he said, "Hello."

Q. That was after Monday, is that correct? You said you had gotten a job with Murphy in the meantime. A. That was after Monday.

Q. I believe you said that you went down to see if you were still on the pay roll, I believe, if my recollection is right.

A. That is what I said. I went down to see if my name was on the pay roll.

Q. What is the reason you did that? [48]

A. Well, for instance, they knew what the deal was and they said, "Why don't you go down and see if they have a check for you?"

Q. Was it your idea that they were just going to keep paying you while you were off?

A. They might.

Q. You didn't have any conversation with Mr. Gillie or Mr. Crabtree that you should go down and make sure you were fired, did you?

A. To make sure I was fired?

Q. Yes. That you were not employed, in other words?

A. Well, I was talking to them and they asked me if I had seen Ham. I says, "Yes, I have," and they said, "What did he say?" And I said, "He didn't say anything."

Q. But on Saturday, he told you, I think you

(Testimony of Virgil Ramey.)

said, that he would have to let you go, but that he would pay you for the day, is that right?

A. That is right.

Q. "Would have to let you go?"

A. He said the boys refused to go back to work until I was off the shed, "So I guess I will have to let you go," he says, "you might as well take off."

Q. What made you think when you went back again to inquire if you were still on the pay roll, that you might be? I don't quite follow that. [49]

A. Well, it would give him a chance to put me back to work.

Q. In other words, you were not quite sure if it was final on Saturday?

A. I was quite sure it was final, but I figured that he might see his mistake and give me a chance to go back to work.

Q. Give you a chance to come back? I don't understand. What did Ham mean when you met him on Sunday and he said you were hot-headed? What did he mean?

A. He just meant that Mr. Feller and Mr. Cunningham told them I was at the meeting and didn't mean what I said, and I just wouldn't pay the dues. [50]

* * *

Trial Examiner Spencer: Who was the shop steward?

The Witness: Mr. Crow or Snow, I am not sure.

(Testimony of Virgil Ramey.)

Trial Examiner Spencer: He was employed there at that time, and was he the shop steward?

The Witness: That's right.

Mr. Crow: Crow is the name. [51]

* * *

Q. (By Mr. Gillie): Now, this is just pertaining to the question that Mr. Burke asked you. Did you know at the time that you took this fellow King's place, that he was fired for cause? Did anybody tell you at that time that he had been fired for cause? A. Yes. [53]

* * *

Q. (By Mr. Gillie): You do know that in the contract that was pending at the time there was a clause in such contract that gave management the right to fire people for cause, you know of that provision in the contract?

A. Yes, I know of that.

Q. Referring to the management, when you met agents Crabtree and I believe Dick Perry and myself, when Ham came up to you and asked for you to come up and said for you to get out of the shop because the boys wouldn't work, he was talking directly to you at that time, and I told you to leave the shop rather than cause any more disruption. Do you remember my saying that? A. Yes.

Q. Do you remember my saying in front of you in your presence to Ham Hamilton, "Is this man fired or discharged?" and Hamilton said at the time, "He was neither"? A. I remember.

(Testimony of Virgil Ramey.)

Q. I asked him to give me that in writing and he refused [54] to do so. A. Yes.

Q. And the next time I spoke to you, I told you to go back and you went there for a check on the following payday?

A. You asked me to ask him.

* * *

Redirect Examination

By Mr. Magor:

Q. What is your best knowledge of the reason that Mr. King was discharged?

A. Well, Mr. Hamilton said that he let some boards slip down on top of the melons—let them slip down into the bin several times that day, so he said, "I let him go." He says, "You want to come out and dump melons?"

Q. When was it Mr. Hamilton told you about that?

A. That was August 2, about five o'clock in the evening.

Q. What is the basis of your knowledge that the union presented a grievance to the company concerning Mr. King's discharge? The union on your cross-examination here told you the union presented a grievance.

A. I don't quite understand you there.

Mr. Burke: I asked——

Mr. Magor: Just a minute. I will clear [55] that up.

(Testimony of Virgil Ramey.)

Q. (By Mr. Magor): On cross-examination you testified that the union presented a grievance to the company concerning King's discharge, is that your answer?

A. I understand they had quite a disagreement over him being discharged.

Q. What is the basis of your knowledge that there was a disagreement about his being discharged? A. By King saying that.

Q. Who told you?

A. That night that I went to work Mr. Crow and this same man came back, and this man that got discharged was showing him what he got discharged for, and I didn't know who Mr. Crow was then, or what he was, or this man that got discharged, who he was.

Q. Did you know what his name was?

A. No, I didn't. I didn't get his name at that time.

Q. Was Mr. Hamilton there talking with Mr. Crow when this man came up?

A. There was nobody there at that time, but just the two of them.

Q. Is that the only knowledge you have—had at the time?

A. That is all the knowledge I had at that time.

Q. What is the basis of your knowledge that at the time you stopped working for Pappas and Company, that King went back to work? [56]

A. Well, that day I was put off they insisted

(Testimony of Virgil Ramey.)

that Mr. Hamilton putting him back on the same job that I was put off.

Q. Who insisted?

A. Mr. Feller, Mr. Crow, Mr. Cunningham.

* * *

Q. Tell me just exactly what was said at that time concerning King, and who said it?

A. Well, they said that——

Q. Who is "they"? Identify the individual, if you can?

A. Well, I couldn't say for sure which one it was, now. They said—and that might be Mr. Feller or Mr. Cunningham—but they did insist on putting him back on the same job. But Ham says, "No, I won't do it." He said, "I will put him back to work, but not on that job." And that is all I know of that.

Q. That is all of the conversation?

A. I didn't know anything more until the following Monday [57] I saw him out there dumping melons.

Q. And this was the same man?

A. The same man, yes.

Q. Is that the man by the name of King?

A. I don't know his last name—I think they called him Jimmie.

Q. You don't know whether the man's name was King or not?

A. No. The man you referred to getting discharged?

(Testimony of Virgil Ramey.)

Q. That was the man I meant. A. No.

Mr. Magor: That is all.

Recross-Examination

By Mr. Burke:

Q. If my memory serves me, you said when you first went in the company that the fellow driving the tug was going up and down, and when the machinery stopped you asked him why it had stopped, is that approximately correct? Then you walked on into the shop with him——then you heard Mr. Feller saying something about somebody not being a union man, am I correct? A. That is right.

Q. You do not know the stoppage happened to start, do you? You were not there—it was stopped when you got there?

A. That is right. They were all sitting down.

Q. Whether Feller had said anything prior to the time you walked in, you don't know? [58]

A. No.

Q. And that was all over, then you got in an argument with Feller about whether you were or were not a union member? A. That is right.

Q. At that time you did not discuss the King grievance with them at all? A. No.

Q. And this was about two o'clock, was it? And finally when it got to be four or four-thirty they insisted on going back to work, or was that earlier?

A. I would say it was somewhere around in the neighborhood of three o'clock, when the machinery

(Testimony of Virgil Ramey.)

stopped. Somewhere in there, I couldn't say for sure now.

Q. Just a little after you had your conversation with Feller and Crow? A. Yes.

Q. About Hamilton putting King back to work, or was it around the same time?

A. It all happened in the same argument. [59]

* * *

BOYCE WARD

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Magor:

* * *

Q. And directing your attention now to the season of 1950, were you employed by Pappas and Company at that time? A. Yes.

Q. Did you know Virgil Ramey? A. Yes.

Q. Was Virgil Ramey working for the company at that time? A. Yes.

Q. What was your job or occupation during the month of August, 1950, with Pappas and Company? A. I was a lidder.

Q. As a lidder where did you work?

A. Well, I worked inside the shed.

Q. That is the packing shed? A. Yes.

Q. Was that at Mendota, California?

A. That is right.

(Testimony of Boyce Ward.)

Q. Do you know Duke Cunningham?

A. Yes.

Q. Do you know Chuck Feller? A. Yes.

Q. Directing your attention to August 5, 1950, did you hear any conversation that day between Virgil Ramey, Duke Cunningham and Chuck Feller? [61] A. Yes, I did.

* * *

Q. (By Mr. Magor): Who was present at the time? A. Well, the whole crew was present.

Q. Who was present besides the crew?

A. Well, that was Chuck Feller and Duke, and Ham, the foreman, and George was there—George Pappas. [62]

Q. Can you tell me to the best of your recollection at that time what was said, and who said it?

A. Well, whenever I first walked out, I think that Ramey was speaking. He said that he had told these guys that he would pay his dues as soon as they had the election, and he found out who was going to represent the workers, then he would pay his dues to the one that won. Then Duke Cunningham said that he couldn't find where Ramey had ever belonged to the union, and Ramey told him he was a liar. Then he got mad, he said he had belonged to the union and he had worked for many years down here at Richman's, and a little bit more talk I don't remember exactly what it was, and then Duke says that he had looked up in the records, and found that Ramey was a little over a year

(Testimony of Boyce Ward.)

behind in his dues, or over a year behind, and Ramey said that that was not true, that he was just two quarters behind in his dues, and then they argued over that a while and I don't remember exactly what was said, and then Duke said, "Well, if you have got $24.00, you can go back to work." And Ramey said, "Well, I don't have $24.00." And then I think he asked Duke if he would loan him $24.00. He was pretty mad, and that is about all I remember. I walked off about that time.

Q. That is all the conversation there was. How long were you present during this conversation, and about how many minutes, if you can recall?

A. Oh, around five or ten minutes, I would [63] say.

* * *

Redirect Examination

By Mr. Magor:

Q. Did you go back to work at all that day?

A. Yes.

Q. When did you go back to work?

A. Well, it was—it seems to me it was over thirty minutes, it might have been longer.

Q. Did the packers go back to work?

A. Yes.

* * *

(Testimony of Boyce Ward.)

Recross-Examination

By Mr. Burke:

Q. Did you know King that was on that same job that Ramey had? A. Yes.

Q. You knew that he had been discharged?

A. Yes.

Q. When you went back did you notice whether he was working, anyway, or not?

A. I don't remember whether he did or didn't.

Q. Did you subsequently see him after that at the shed on any later day? [67]

A. The next day he was on the job. [68]

* * *

JOHN WARKENTINE

a witness called by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Magor:

Q. Mr. Warkentine, is there any interchange from the packing shed to the ranches?

A. Very seldom.

Q. Very seldom? A. Yes.

Q. Now, when the packing shed closes down to all of those employees? They cease working?

A. That is true. [69]

* * *

(Testimony of John Warkentine.)

Q. Did you have any contract during the year 1950 with the packing shed employees?

A. Well, we belong to the Western Growers Association, here in Los Angeles, or in Los Angeles, rather.

Q. During the year 1950 were the Western Growers under contract with any labor organization?

A. That would be beyond me. I don't know.

Mr. Burke: We will stipulate there was an agreement, to which Pappas was a party.

Mr. Magor: Is this the one?

Mr. Burke: In the 1950 packing shed agreement.

Mr. Magor: I would like to have this document marked for identification purposes as General Counsel's Exhibit No. 3. [70]

(Whereupon the document above referred to was marked General Counsel's Exhibit No. 3 for Identification.)

Trial Examiner Spencer: It is so marked.

Mr. Magor: I formally offer General Counsel's Exhibit No. 3.

Trial Examiner Spencer: Any objection by anybody?

Mr. Burke: No objection.

Trial Examiner Spencer: Received.

(The document heretofore marked General Counsel's Exhibit No. 3 for Identification was received in evidence.) [71]

* * *

THERON HAMILTON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Magor:

* * *

Q. Were you ever employed by Pappas and Company? A. Yes.

Q. When were you first employed by that company? A. In 1947.

Q. And during the year 1950 were you working with Pappas and Company? A. Yes. [76]

Q. What was your job at that time?

A. Shed foreman.

Q. And as shed foreman, could you hire and fire employees, in the shed? A. Yes, I could.

Q. Do you know Virgil Ramey? A. Yes.

Q. Was Virgil Ramey working with them during the month of August, 1950? A. Yes.

Q. Do you know Duke Cunningham?

A. Yes.

Q. Do you know Chuck Feller? A. Yes.

Q. Directing your attention to the month of August, 1950, did you have any conversation with either Duke Cunningham or Chuck Feller, or both of them, concerning Ramey? A. Yes.

Q. When did that conversation occur?

A. What time?

Q. Yes. What date, if you can recall?

A. The first time, as I recall, was either the second or third of August.

(Testimony of Theron Hamilton.)

Q. Was Ramey working for the company at that time? A. Yes. [77]

Q. And where were you talking to the gentleman?

A. It was on the shed.

Q. Who were you talking to?

A. Talking to Feller and Cunningham.

Q. Do you recall what time of day it was?

A. It was in the afternoon, to the best of my knowledge, shortly after lunch.

Q. Was anybody else present at the time?

A. At that time there wasn't—just the three of us.

Q. Just the three of you. Will you tell me to the best of your recollection what conversation occurred at that time?

A. Well, they just wanted to know whether I had Ramey working there. Feller says he was not a union member and asked me why I didn't get rid of him. During the course of the conversation they suggested that I put this James Yokas back to work and just let Ramey go. The men told me that the union insisted that I put him back to work, and I had no place for him. That was the end of that conversation. I wouldn't do it.

Q. That was all the conversation at that time?

A. Well, that was about the extent of that.

Q. Now, did you have any conversations with either Feller or Cunningham after that?

A. Yes, whenever we had this labor trouble.

Q. What labor trouble are you speaking of?

A. I think it was the fourth—maybe a couple of

(Testimony of Theron Hamilton.)

days later, [78] whenever it is, and Chuck Feller and I were talking over in regard to Ramey.

Q. Just a couple of days later, is that right?

A. Yes, one or two days. I don't know.

Q. Where were you talking with Feller at that time? A. On the shed.

Q. Do you recall what time of day it was?

A. It must have been along in the middle of the afternoon.

Q. Was anybody else present besides you?

A. At the time Chuck and I was alone.

* * *

Q. (By Mr. Magor): Now, will you give the conversation that occurred at that time?

A. Chuck asked me if I wouldn't get rid of this Ramey, and I told him no that I couldn't do it on account of the National [79] Labor Relations Board. I figured it would be a violation of it, I didn't want to discharge him on that account because he didn't want to join the union. I went on and had a conversation with Chuck, and Chuck told me at the time they were going down there they were going to insist on a closed shop, and I told them if they did insist on a closed shop to please not to use my shed for an example. I mean, if he was going to take them all, then I didn't expect to be excluded, but not to use mine as an example, so we shook hands and parted like that. That is the way it was settled. I saw the carloaders needed some information on loading the cars up and about that time Duke Cunningham came in and I

(Testimony of Theron Hamilton.)

excused myself and Duke was pretty mad, I assumed about this Ramey—presumably had a telephone call from the Imperial Valley, checking on his dues. I excused myself and went over to straighten the car-loaders out. In the meantime Cunningham went down through, back to the packers, and Herschel Crow and Chuck was going from packer to packer, talking to them, and then they walked out.

Q. Who walked out? A. The packers.

Q. You mean they stopped working?

A. Yes, they stopped working and went to the back end of the shed away off, and none of the car-loaders knew about it. Mr. Pappas came out and he asked me why they were going unless it was over that Ramey, and he walked down—Mr. Pappas [80] asked me then again if they were going down to hold a union meeting on the shed; he didn't think it was the place to hold union meetings; they could go out behind and hold it. So finally, the conversation got around to finding out what they wanted. Duke made the formal demands, as to discharging Ramey and putting a union man back to work in his place.

Q. What else was said?

A. Well, I told them I couldn't do it on account of the National Labor Relations Board, and Duke kept insisting as of now it is going to be a closed shop from here on out, and Ramey was called in; he came in about that time and Duke and Chuck and Ramey they almost got into a big fight——

Q. Just tell me what was said when Ramey came in, everything that happened.

(Testimony of Theron Hamilton.)

A. Well, when Ramey came in he asked me what the trouble was if it was over him. I told him it was, and then I think Duke asked him if he had his dues paid up, I think he said that he did——

Trial Examiner Spencer: That is, Duke asked Ramey?

Witness: Yes, and I believe Duke told him he was $24.00 short, or needed to deposit $24.00, or owed $24.00 or something, anyhow $24.00 entered into it, and asked him if he would be willing to post $24.00? So Ramey told him no, so finally when I got the melons packed I asked Duke if he would post that $24.00, if he would let Ramey go back to work, and Duke said, [81] "no," he said, "You let him post the $24.00," and they would investigate and they would let me know Monday whether he got in back to work.

Trial Examiner Spencer: Would you explain what you mean by posting?

Witness: Well, it was for his union dues.

Trial Examiner Spencer: What do you mean by posting it?

Witness: I think the dues—I don't know, I think it is $5.00 a half, I think it would have paid the year's dues.

Trial Examiner Spencer: I just wanted to be sure it would be understood by those reading the record.

Q. (By Mr. Magor): What did Cunningham say then?

A. He wouldn't let him go back to work, and then he walked over there——

(Testimony of Theron Hamilton.)

Q. So what was said? Just tell me all that happened, right then and by whom? Were the packers working at that time?

A. No, the packers were sitting out. I finally told Ramey then to go on and take the afternoon off and I would pay him for that afternoon. In the meantime, we would try to get it settled. I asked the packers and Duke if that was satisfactory if they would go back to work and finish up, and they said "yes," so Ramey left and we went back to work and finished up the day.

Q. After Ramey left the packers *go* back to work?

A. Yes, they went back to work and finished up the day, and [82] I think I told Ramey maybe we could get it straightened out over the week end, but they still would not agree to it, so——

Q. Wait a minute. You told Ramey what? What did you have to say to him that day, when you let him go?

A. I told him that I would pay him for that afternoon and in the meantime we would try to get hold of Duke and Chuck and try to see if we couldn't get them to let him go back to work.

Q. Was that all the conversation you had with Ramey? A. Yes.

Q. And did you see Cunningham or Feller after that? A. I see Feller.

Q. When did you see Feller?

A. Sunday afternoon.

(Testimony of Theron Hamilton.)

Q. And this took place on Saturday?

A. Yes.

Q. And that would be the following Sunday?

A. That is right.

Q. Where were you and Feller at that time?

A. In the Sunset Cafe.

Q. Where is the Sunset Cafe located?

A. It is in the valley.

Q. What time was it to the best of your recollection?

A. I think it was three or between two and three o'clock in the afternoon. [83]

Q. Who was present?

A. Just Chuck and I were sitting there. There were some more people were sitting there, but I don't know who they were.

Q. The Chuck you are referring to is Chuck Feller? A. Chuck Feller.

Q. Give me the discussion at that time, the conversation.

A. Well, it was in regards to Ramey, and I asked him why he wouldn't let him go back to work and he said, "Well, he just is not a union member, and they just don't want him," he says, "He is no good for the union, and they just don't want him." I don't remember the exact conversation that went on but it was just in regards to that, and it was just a refusal of not letting him to go back to work, and so Monday morning——

Q. Was that all the conversation?

A. Well, about all I can recall.

(Testimony of Theron Hamilton.)

Q. What happened Monday morning?

A. Well, Monday morning they came back down.

Q. Who came back down?

A. The crew came back at eight o'clock to go to work. Ramey was present and the crew refused to go to work if he was on the job so Ramey told me "If they don't want to work, well, I will leave, I will leave the shed, I won't cause any trouble." Then McNamara and Crabtree and one other fellow from our shed, and Herschel Crow came up and told me that he didn't want to work while they were on the shed, so I told Herschel to tell [84] them to get off, and he said it wasn't his duty to tell them to get off, that it was mine, so I told him they was pretty big, I didn't know, so I went over and I told Mr. McNamara and they immediately left the shop.

Q. Can you identify Mr. McNamara for the record? A. Pardon?

Q. Can you identify Mr. McNamara? Do you have any personal knowledge of what his job is?

A. Well, other than what he told me he was.

Q. What did he tell you he was?

A. He was the representative for the CIO.

Q. And Mr. Crabtree was present, you say?

A. That is right.

Q. And he is a representative of the CIO?

A. He is a representative of the CIO.

Q. You spoke of Mr. Crow. What is Mr. Crow's position?

(Testimony of Theron Hamilton.)

A. Mr. Crow is the shop steward for the shed.

Q. And was Mr. Crow a member of the FTA?

A. Yes.

Q. During the season of 1950, or any time during the time you were working as shed foreman for Pappas and Company, was a union authorization election held for Pappas and Company by the National Labor Relations Board? A. No. [85]

* * *

Cross-Examination

By Mr. Burke:

* * *

Q. Were you operating Sunday?

A. No. [86]

* * *

Q. You said this fellow, named—we have been speaking of him as Jim King, was doing the same job as—— A. Caine?

Q. Was doing the same job—or King, rather.

A. No, that was not his name. I had no King working for me.

Q. What was the fellow's name that was around at that time that you discharged?

A. Yokas.

Q. When did anybody first discuss the discharge of Yokas with you?

A. It was on a—I believe to the best of my knowledge, it was on about the 2nd—after I fired Yokas.

Q. What time was that?

A. Well, I would say roughly to the best of my

(Testimony of Theron Hamilton.)

knowledge, about three or three-thirty in the afternoon.

Q. You fired him at that time? A. Yes.

Q. When did you put Ramey on his job?

A. After lunch, when *we back* to work after I made a repair, that would be about six, would it? Or five?

A. From five-thirty to six. I don't remember any time, I [87] would say it was six o'clock.

Q. How did you happen to have Ramey available?

A. I was looking for someone to take his place, and I ran into Ramey.

Q. And you had arranged with Ramey to come out before you fired Yokas? A. No.

Q. No? Just happened to be in the shed?

A. I had made arrangements with Ramey to go to work loading Persians and—when the Persians started.

Q. And when you fired Yokas you told him to be there?

A. He was the first man that I seen that wanted to work, so I hired him. [88]

* * *

Q. Isn't it the fact of the matter that you did reinstate Yokas?

A. Yes, I did that just to try to get the crew settled back and thinking they would let me go ahead and use Ramey and maybe we could go ahead and get the thing going. [92]

* * *

(Testimony of Theron Hamilton.)

Q. On Saturday, that is the day I am talking about, as the result of that stoppage, he was reinstated on the job, isn't that true?

A. No, not then. I *put back* to work on Monday, with the reservations in my mind that if I put him back to work they more or less guaranteed me that he would not be neglectful and let any more culls go through, so I took the chance and put him back to work, thinking they would let Ramey go to work and finish that. You see, the point is, I had promised him a job unloading Persians, which deal would start in about ten days, and tried to get the thing peaceably started again by reinstating Yokas. [93]

* * *

Q. And on the 5th did the union representatives insist that Yokas be reinstated?

A. No, whenever we had this trouble, whenever they insisted that Ramey leave the property.

Q. On August 3, you gave the job to Ramey and they insisted that he come back?

A. No, I voluntarily put him back myself.

Q. Nobody asked you to put him back, no union representative?

A. Yes, they asked me to put Yokas back to work and tell Ramey that the union forced me to put Yokas back to work, then there would be no more trouble.

Q. Isn't it true that you raised the question that if you put Yokas back to work and let Ramey go that you would be in [96] trouble with the Labor Board? A. If I did what?

(Testimony of Theron Hamilton.)

Q. If you put Yokas back and let Ramey go, that you would get in trouble with the Labor Board?

A. Well, I put somebody else on the job that afternoon.

Q. That Saturday afternoon? To finish up?

A. Yes.

Q. Well, somebody else was there.

A. And then my idea of putting Yokas back to work, I talked to Yokas Sunday afternoon myself, and I asked him if he would come back and go to work, thinking maybe this whole thing would be settled and maybe they would let Ramey go back and work on the Persians, when the Persians started. They hadn't started at that time, but he was supposed to do the Persians in a few days, and I thought by putting Yokas back to work that they would let him go ahead and finish and we would have no more trouble, but as far as putting Yokas back through demands, that was not the reason for putting Yokas back. [97]

* * *

Q. You had about how many workers in the shed when you were operating there?

A. Roughly about sixty when we are operating on cantaloupes. [99]

* * *

Q. You were never called upon to fire anyone for failure to pay his dues, were you?

A. Not until this incident.

Q. Isn't it true that you offered to pay Ramey's dues?

(Testimony of Theron Hamilton.)

A. No. I offered to loan Ramey the money if he wanted to pay them.

Q. Ramey wanted to go to work on that day and isn't it true that they said he can go to work and then pay us?

A. They said they would——

Q. Look into it?

A. If he would deposit the $24.00 that they would investigate it and let us know Monday. [100]

* * *

Q. I think the record will show that you said you asked union organizer Cunningham that if that was done could Ramey go to work, and Cunningham said "No, they would investigate it."

A. Yes, that is right. Of course I didn't ask Duke about lending him the money. I asked Duke if he paid his dues if he could go back to work and Duke said "no."

Q. The answer was no at that point.

A. That he would have to investigate and check on him and let us know Monday. [101]

* * *

Mr. Magor: Can we reach a stipulation about the United Fresh Fruit and Vegetable Workers Local Industrial Union 78, CIO, is a labor organization within the meaning of the Act?

Trial Examiner Spencer: Is it so agreed? I hear no dissent. I believe Mr. Burke is nodding that he will so stipulate.

(Testimony of Theron Hamilton.)

Mr. Magor: I think the charging party will also stipulate.

Mr. Gillie: That is true.

Mr. Magor: General Counsel will accept the stipulation.

Can it also be stipulated that the Fresh Fruit and Vegetable Workers Union 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, is a labor organization within the meaning of the Act?

Trial Examiner Spencer: So stipulate?

Mr. Burke: Yes.

Mr. Gillie: I will stipulate that it was. I mean it has changed hands.

Trial Examiner Spencer: Mr. Gillie, are you willing to stipulate that it is a labor organization within the meaning of the Act?

Mr. Gillie: Yes.

Mr. Magor: General Counsel will accept the stipulation. General Counsel will rest his case in chief. [103]

* * *

Trial Examiner Spencer: And is it agreed that there has been no union shop election among these employees affected here?

Mr. Magor: That was Mr. Hamilton's testimony.

Trial Examiner Spencer: Yes. Is there any dispute about that fact?

Mr. Burke: No, not at all.

* * *

HERSCHEL CROW

a witness called by and on behalf of the Respondent Food, Tobacco, Agricultural and Allied Workers of America, being first duly sworn, was examined and testified as follows: [104]

* * *

Cross-Examination

By Mr. Magor:

* * *

Q. When was the man discharged?

A. Well, I believe the date would show there.

Q. Was it the same date that Mr. Ramey went to work?

A. When he first went to work, I guess.

Q. Then Mr. Ramey went to work on August 2?

A. Yes.

Q. And you had this conversation with Mr. Hamilton on August 3? A. Yes.

Q. Did you work August 4?

A. Did I work on August 4? Yes, I believe we did.

Q. And August 5th was Saturday, is that correct?

A. Yes, we worked every day that week, I am sure.

Q. The work stoppage did not commence until August 5, is that correct? A. Yes. [117]

* * *

Certificate

This is to certify that the attached proceedings before the National Labor Relations Board for the 20th Region in the matter of: Pappas and Company, et al., and United Fresh Fruit and Vegetable Workers Local Industrial Union 78, C.I.O., et al., Case No. 20-CA-493, etc., El Centro, California. February 8, 1951, were had as therein appears, and that this is the original transcript thereof for the files of the Board.

ACME REPORTING
COMPANY,
Official Reporters.

By /s/ E. L. DRUMMOND,
Field Reporter.

Received February 23, 1951.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

PAPPAS AND COMPANY and FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78, and FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA,
Respondents.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled "In the Matter of Pappas and Company and United Fresh Fruit and Vegetable Workers Local Industrial Union 78, CIO," the same being known as Case No. 20-CA-493; and "In the Matter of Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America and United Fresh Fruit and Vegetable Workers Local Industrial Union 78, CIO," Case No. 20-CB-159 before said Board, such transcript

including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Order designating William E. Spencer Trial Examiner for the National Labor Relations Board, dated February 8, 1951.

2. Stenographic transcript of testimony taken before Trial Eraminer Spencer on February 8, 1951, together with all exhibits introduced in evidence.

3. Copy of Trial Examiner Spencer's Intermediate Report and Recommended Order, dated March 5, 1951, (annexed to item 10 hereof); Order transferring cases to the Board, dated March 5, 1951, together with affidavit of service and United States Post Office return receipts thereof.

4. General Counsel's telegram, dated March 22, 1951, requesting extension of time for filing exceptions.

5. Copy of Board's telegram, dated March 22, 1951, granting all parties extension of time for filing exceptions and briefs.

6. Fresh Fruit and Vegetable Workers Union Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America (hereinafter called Respondent Union) telegram, dated April 4, 1951, requesting further extension of time to file exceptions and briefs.

7. Copies of Board's telegrams, dated April 4 and April 5, 1951, respectively, granting all parties extension of time to file exceptions and briefs.

8. General Counsel's exceptions to the Intermediate Report received April 5, 1951.

9. Copy of Executive Secretary's letter, dated April 18, 1951, to Respondent Union advising Board will not consider said Respondent Union's exceptions to the Intermediate Report.*

10. Copy of Decision and Order issued by the National Labor Relations Board on June 15, 1951, with Intermediate Report and Recommended Order annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 27th day of June, 1952.

[Seal] /s/ LOUIS R. BECKER,

Executive Secretary,
National Labor Relations
Board.

---

*Copy of rejected exceptions attached to this item in Volume I.

[Endorsed]: No. 13444. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Pappas and Company and Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, Respondents. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed June 30, 1952.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. IV, Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent, Pappas and Company, (hereinafter called Respondent Company), its officers, agents, successors, and assigns and Respondent, Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of

America (hereinafter called Respondent Union), its officers, representatives, agents, successors, and assigns. The consolidated proceeding resulting in said Order is known upon the records of the Board as "In the Matter of Pappas and Company and United Fresh Fruit and Vegetable Workers Local Industrial Union 78, CIO," Case No. 20-CA-493; and "In the Matter of Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America and United Fresh Fruit and Vegetable Workers Local Industrial Union 78, CIO," Case No. 20-CB-159.

In support of this petition the Board respectfully shows:

(1) Respondent Company is a California corporation engaged in business in the State of California and Respondent Union is a labor organization engaged in promoting and protecting the interests of its members in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on June 15, 1951, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent Company, its officers, agents, successors, and assigns; and Respondent Union, its officers, representatives, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondents by sending copies thereof

postpaid, bearing Government frank, by registered mail, to Respondents' representatives.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and Requiring Respondent Company, its officers, agents, successors, and assigns and Respondent Union, its officers, representatives, agents, successors, and assigns to comply therewith.

/s/ A. NORMAN SOMERS,
Assistant General Counsel,
National Labor Relations
Board.

Dated at Washington, D. C., this 27th day of June, 1952.

[Endorsed]: Filed June 30, 1952.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON BY THE BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, petitioner herein, and pursuant to Rule 19 (6) of the rules of this Court, files this statement of points upon which it intends to rely in the above-entitled proceeding, and this designation of parts of the record necessary for the consideration thereof:

I.

Statement of Points

1. Substantial evidence on the record considered as a whole supports the Board's conclusion that respondent Pappas and Company discharged employee Virgil E. Ramey in violation of Section 8 (a) (3) and 8 (a) (1) of the National Labor Relations Act, as amended.

2. Substantial evidence on the record considered as a whole supports the Board's conclusion that respondent Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, in violation of Sections 8 (b) (1) (A) and 8 (b) (2) of the National Labor Relations Act, as amended, attempted to cause and caused respondent Pappas and Company unlawfully to discriminate against employee Virgil E. Ramey.

3. The Board's order is valid and proper under the National Labor Relations Act, as amended.

* * *

Dated at Washington, D. C., this 27th day of June, 1952.

/s/ A. NORMAN SOMERS,
Assistant General Counsel,
National Labor Relations Board.

[Endorsed]: Filed June 30, 1952.

ORDER TO SHOW CAUSE

(July 8, 1952)

United States of America—ss.

The President of the United States of America

To: Fresh Fruit & Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America, 656 East Market St., Salinas, California, and United Fresh Fruit & Vegetable Workers, Local Industrial Union 78, CIO, Att: Mr. H. L. McNamara, 5162 Alisal, Salinas, Calif.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 30th day of June, 1952, a petition of the National Labor Relations Board for enforcement of its order entered

on June 15, 1951, in a proceeding known upon the records of the said Board as

> "In the Matter of Pappas and Co., and United Fresh Fruit & Vegetable Workers Local Ind. Union 78, CIO, Case No. 20-CA-493 and In the Matter of Fresh Fruit & Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America and United Fresh Fruit & Vegetable Workers Local Industrial Union 78, CIO, Case No. 20-CB-159,"

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 30th day of June in the year of our Lord one thousand, nine hundred and fifty-two.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Returns on Service of Writ attached.

Received July 2, 1952.

[Endorsed]: Filed July 8, 1952.

ORDER TO SHOW CAUSE

(July 14, 1952)

United States of America—ss.

The President of the United States of America

To: Distributive, Processing and Office Workers of America, Att.: Mr. Arthur Osman, 13 Astor Place, New York, N.Y.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 30th day of June, 1952, a petition of the National Labor Relations Board for enforcement of its order entered on June 15, 1951, in a proceeding known upon the records of the said Board as

> "In the Matter of Pappas and Co., & United Fresh Fruit & Vegetable Workers Local Industrial Union 78, CIO, Case No. 20-CA-493, and In the Matter of Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America and United Fresh Fruit & Vegetable Workers Local Industrial Union 78, CIO, Case No. 20-CB-159,"

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed

in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 30th day of June in the year of our Lord one thousand, nine hundred and fifty-two.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Return on Service of Writ attached.

[Endorsed]: Filed July 14, 1952.

ORDER TO SHOW CAUSE

(Aug. 6, 1952)

United States of America—ss.

The President of the United States of America

To: Pappas and Company, Mendota, California; Fresh Fruit and Vegetable Workers Union, Local 78 and Food, Tobacco, Agricultural and Allied Workers Union of America, Att.: Messrs. Robert H. Burke and Chuck Ervin, P.O. Box 1678, El Centro, Cal., and United Fresh Fruit & Vegetable Workers, Local Ind. Union 78, CIO, Att.: Mr. T. F. Flynn, 1010 S. Broadway, Los Angeles, Calif.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 30th day of June, 1952, a petition of the National Labor Relations Board for enforcement of its order entered on June 15, 1951, in a proceeding known upon the records of the said Board as

> "In the Matter of Pappas and Company and United Fresh Fruit and Vegetable Workers Local Industrial Union, 78, CIO, Case No. 20-CA-493 and In the Matter of Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America and United Fresh Fruit and Vegetable Workers Local Industrial Union 78, CIO, Case No. 20-CB-159,"

and for entry of a decree by the United States

Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 30th day of June in the year of our Lord one thousand, nine hundred and fifty-two.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Returns on Service of Writ attached.
Received July 7, 1952.
[Endorsed]: Filed August 6, 1952.

[Title of Court of Appeals and Cause.]

ANSWER OF PAPPAS & COMPANY TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND REQUEST FOR REVIEW OF, AND TO SET ASIDE SAID ORDER

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the respondent Pappas & Company,

herein called the Company, and appearing for itself alone and not for any other person, firm or corporation, in answer to the Petition for Enforcement of an Order of the National Labor Relations Board and in support of its request for review of, and to set aside the said order, admits, denies and alleges as follows:

1. Answering the allegations contained in Paragraph 1 of the Petition for Enforcement of the said Order, the Company admits that it is a California corporation engaged in business in the State of California; admits that the respondent union is a labor organization within this judicial circuit; and admits that this court has jurisdiction of the within action.

2. Admits the allegations contained in Paragraph 2 of the Petition for Enforcement of the said Order.

3. Admits the allegations of Paragraph 3 of the Petition for Enforcement of said Order.

4. Denies that at any time mentioned in the petition, or at any other time, the Board had jurisdiction over the Company, its officers, agents, successors or assigns and because of the Board's lack of jurisdiction, the Compay avers that the proceedings had before the Board, the findings of fact, conclusions of law, and order of the Board were and are in all respects invalid and improper under the act.

5. Denies the wrongful, or any discharge of Virgil E. Ramey as found by the Board and avers

that the termination of the employment of the said Virgil E. Ramey was by his own act and was not induced by the activities of the Company, its officers, agents, successors, assigns or by any person or persons over whom the Company had control.

6. Denies that there has been any violation by this respondent company of any provisions of the Labor Management Relations Act, 1947, 61 Stat. 146, 29 U.S.C., Section 141, et seq.

Wherefore, having answered each and every allegation contained in the said Petition for Enforcement of an Order of the National Labor Relations Board, the Company requests that this honorable court deny the petitioner's prayer that the said order be enforced. Further answering, the Company, pursuant to Section 10 (f) of the National Labor Relations Act, respectfully requests this honorable court for review of, and to set aside the said order.

7. This court has jurisdiction of this proceeding pursuant to the provisions of Section 10 (f) of the National Labor Relations Act, 49 Stat. 452, 29 U.S.C., Section 151, et seq., as amended by the Labor Management Relations Act, 1947, 61 Stat. 146, 29 U.S.C., Section 141, et seq. The nature of the proceeding as to which review is sought is as follows:

(a) On November 30, 1950, the regional director of the National Labor Relations Board, 821 Market Street, San Francisco 3, California, issued a consolidated complaint against the Company (Board

cases No. 20-CA-493 and No. 20-CB-159) alleging that the Company had engaged in an unfair labor practice within the meaning of Section 8 (a) (1) of the act. The complaint was based on a charge filed on November 28, 1950, by United Fresh Fruit and Vegetable Workers Industrial Union, Local 78 C.I.O. The complaint alleged in substance that on or about August 5, 1950, the respondent discharged Virgil E. Ramey at the request of Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America because the said Virgil E. Ramey was not a member in good standing in the said union, and alleged that by such acts the respondent had interfered with, restrained and coerced its employees in violation of Section 7 of the act.

(b) Pursuant to notice, a hearing was held on February 8, 1951, in El Centro, California, before a trial examiner designated by the Board. In March, 1951, the trial examiner issued an Intermediate Report and Recommended Order in which he concluded that the respondent company did not discriminate in regard to the hire and tenure of employment of Virgil E. Ramey, and did not interfere with, restrain and coerce its employees in the exercise of their rights under Section 7 of the act; but concluded that the respondent Fresh Fruit and Vegetable Workers Union, Local 78, and Food, Tobacco, Agricultural and Allied Workers Union of America had engaged in unfair labor practices within the meaning of Section 8 (b) (2) of the act by attempting to cause the respondent company to

discriminate against Virgil E. Ramey in violation of Section 8 (a) (3).

(c) On June 15, 1951, the National Labor Relations Board issued its Decision and Order in which it refused to adopt the Intermediate Report and Recommended Order of the trial examiner but instead held that both the Company and the respondent union had jointly discriminated against Virgil E. Ramey in violation of Section 8 (a) (3) and Section 8 (b) (2) of the act.

(d) The Decision and Order complained of herein was rendered by Board members John M. Houston and Paul L. Styles with a dissenting opinion by James J. Reynolds, Jr., on June 15, 1951.

8. The points upon which the Company intends to rely for the relief hereinafter requested are as follows:

(a) Certain material findings of fact upon which the Board predicated its Order are erroneous because they are contrary to the evidence considered as a whole and said findings are unlawful because they are not supported by substantial evidence upon the record considered as a whole.

(b) The conclusions of law upon which the said order is based are contrary to law because they are either unsupported by the findings of fact or predi-

cated upon erroneous findings of fact and are unsupported by the record considered as a whole.

(c) The said order is arbitrary and capricious, constitutes an abuse of discretion and exceeds the powers vested in the Board.

(d) Said order is beyond jurisdiction of the Board because the Board did not have jurisdiction over the Company.

Wherefore, the respondent company prays:

1. That a certified copy hereof be forthwith served according to the law upon the Board.

2. That the said proceedings, findings, conclusions, Decision and Order of the Board be reviewed by this honorable court; that said order be set aside, vacated and annulled in its entirely; and that the Board be ordered to dismiss the complaint against the Company.

3. That this court exercise its jurisdiction and grant to the Company such other and further relief in the premises as the rights and equities of the cause may require and may seem just and proper to this court.

MOSS, LYON & DUNN,
By /s/ ARVIN H. BROWN, JR.,
Attorneys for Respondent,
Pappas & Company.

[Endorsed]: Filed August 9, 1952.

No. 13444

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PAPPAS AND COMPANY, AND FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78, AND FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
ARNOLD ORDMAN,
DUANE BEESON,
Attorneys,
National Labor Relations Board

INDEX

AUTHORITIES CITED

In the United States Court of Appeals for the Ninth Circuit

No. 13444

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PAPPAS AND COMPANY, AND FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78, AND FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order issued on June 15, 1951, against respondents, hereinafter called the Company and the Union, respectively, pursuant to Section 10 (c) of the National Labor Relations Act, as amended.[1] The Board's

[1] 61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151 *et seq.*, hereinafter called the Act. Relevant portions of the Act appear in the Appendix, *infra*, pp. 20–24.

decision and order (R. 21–39) are reported in 94 NLRB 1195. This Court has jurisdiction under Section 10 (e) of the Act, the unfair labor practices having occurred within this judicial circuit at the Company's place of business in Mendota, California.

STATEMENT OF THE CASE

I. The dismissal of employee Ramey for his failure to pay dues to the Union

The facts of this case pertain to the dismissal of Virgil Ramey from his employment at the Company's packing shed in Mendota, California, where it is engaged in the sorting and crating of melons for shipment to market (R. 41–42; 72–74).[2] In brief, the Board found that the Union engaged in a work stoppage for the purpose of securing Employee Virgil Ramey's discharge because he was delinquent in the payment of dues to the Union. The Company, in turn, was found to have acquiesced in the Union's demand, and to have effected Ramey's discharge. Inasmuch as there was not in effect a union-security agreement immunizing such conduct, the Board found (R. 22–27) that the Union thereby violated Sections 8 (b) (2) and 8 (b) (1) (A) of the Act, and the Company violated Sections 8 (a) (3) and 8 (a) (1). The subsidiary facts upon which these findings rest may be summarized as follows:

T. H. Hamilton, the Company's foreman at its packing shed, had made arrangements with Virgil

---

[2] A substantial amount of its products is shipped by the Company to points outside the State of California (R. 42; 83). The Board's jurisdiction is not challenged.

Ramey that the latter should start work at the packing shed when the crating and shipping of Persian melons began sometime in the middle of August, 1950 (R. 121, 122). However, on August 2, before work began on Persian melons, Foreman Hamilton told Ramey that he could report to work immediately to replace another employee, James Yokas, a Union member, who had been discharged for failure to unload melons properly (R. 23; 85, 120–121, 126). Within a day or two after Ramey began work, two business agents of the Union, Chuck Feller and Duke Cunningham, protested to Foreman Hamilton against Ramey's employment because the latter "was not a union member" and asked why Hamilton "didn't get rid of him" (R. 113). No agreement between the Company and the Union conditioning employment on union membership was then in effect, the statutory prerequisites not having been met (R. 47–48; 125).[3] Accordingly, Hamilton refused the demand of Union agents Cunningham and Feller and the conversation ended (R. 113).

On the following days, August 4 and 5, Cunningham and Feller separately approached Ramey on two oc-

[3] At the time of the events in this case, Section 8 (a) (3) of the Act, in a provision subsequently deleted (65 Stat. 601), required a referendum to be conducted among the employees as a prerequisite to a union security agreement. Section 8 (a) (3) provided also, then as now, that even where such an agreement is properly authorized and executed, it is not applicable to an employee until thirty days after the beginning of his employment or the effective date of the agreement whichever is the later. Here, the prerequisite referendum had not been held and the thirty-day period had not elapsed (R. 47–48; 120, 125).

casions while he was working and asked to see his Union dues book (R. 43; 87–89). Ramey, who was in fact a member of the Union but who was six months delinquent in his dues, told them that he did not have his book with him (R. 43; 86–89). On the afternoon of August 5, Business Agent Feller returned to Ramey and urged him to pay his arrearages, but Ramey expressed a preference for a different union which was affiliated with the CIO, and stated that he would not make any payments until a Board election had been held (R. 43; 89–90). Feller then left Ramey and went to Foreman Hamilton to ask again "if [he] wouldn't get rid of this Ramey" (R. 23; 114). When Hamilton refused, Feller told him that the Union was "going to insist on a closed shop" (R. 114), and immediately thereafter called a work stoppage by the Union members in the packing shed (R. 23; 115). All machinery was shut off and production came to a full stop (R. 43; 90, 115).

As soon as the work stoppage had been made complete, Business Agents Cunningham and Feller approached Foreman Hamilton and George Pappas, who was president of the Company and was in the packing shed at the time, and demanded that they discharge Ramey "and put * * * a union man back to work in his place" (R. 23; 115). At the same time they insisted that "it is going to be a closed shop from here on out" (R. 115). A few minutes later Employee Ramey came to the packing shed, and on seeing him, Business Agent Feller stated, "Well this is the reason we called this shutdown—there is

a man working outside that don't even belong to the union" (R. 43–44; 90–91, 115–116). Ramey, learning that he was the man referred to, protested that he did belong to the Union, and a discussion about payment of his dues ensued (R. 44; 91, 108–109, 116). Business Agent Cunningham offered to call off the work stoppage if Ramey would post a year's dues pending an investigation of Ramey's Union status, but Ramey refused to pay the money (R. 23, 44; 92, 109, 116). Finally, after conferring with President Pappas, Hamilton told Ramey that "the boys refuse to go back to work until you are off the shed, so you might as well take off * * *. I will go ahead and pay you for the rest of the day [Saturday] * * *. I hope something will develop and you will go back to work over the weekend" (R. 23–24, 44; 93, 117). Hamilton promised that he "would try to get hold of Duke [Cunningham] and Chuck [Feller] and try to see if he couldn't get them to let him [Ramey] to go back to work" (R. 117). Ramey then left the packing shed and production was resumed (R. 24; 117). Shortly thereafter, President Pappas asked the Union steward of the packing shed, Herschel Crow, "if everything is settled" (Tr. 111). Crow replied that "it looks like it is" to which Pappas responded "that is all right, we don't want the fellow anyway, he is a trouble maker" (*id.*).

On the following day, Sunday, Foreman Hamilton saw Business Agent Feller in Mendota, and asked him why he wouldn't permit Ramey to return to work (R. 117–118). Feller replied that Ramey "just

is not a union member, and they just don't want him" (*id.*). Following this conversation Hamilton approached James Yokas, the employee whose position Ramey had taken upon the former's discharge, and told him that he could have Ramey's job (R. 24, 121, 123). In bringing Yokas, who was a Union member, back to work, Hamilton believed that "this whole thing would be settled and maybe they [the Union] would let Ramey go back and work * * * when the Persians [melons] started" (R. 24; 123). As a final step to settle the difficulty, Hamilton visited Ramey that evening and urged him to pay his Union dues, explaining that "That way you can come back and go to work" (R. 24; 95). Ramey, however, adamantly refused to make any payment of dues to the Union (R. 24; 95).

The next morning Ramey, who considered that he had been discharged (R. 101), appeared at the packing shed, accompanied by two CIO representatives, in the hope that Hamilton would put him back to work (R. 24; 95–96, 101, 119). The other employees saw Ramey, and, led by the Union shop steward, Herschel Crow, stopped their preparations to begin the morning's work, "took their aprons off and stood up in a bunch" (R. 24; 97, 119). Hamilton, observing the Union demonstration, told Ramey, "Well, the boys refuse to work while you are around the shed" (R. 24; 97). Thereupon, Ramey replied, "I am getting off. I don't want to cause any trouble" (R. 25; 97). Ramey left the packing shed, but the employees returned to their jobs only after Hamilton,

at shop steward Crow's request, asked the two CIO representatives to leave also (R. 119). Thereafter, Ramey returned to the packing shed twice: once to pick up his paycheck (R. 97), and another time to see whether Hamilton had recognized "his mistake" in firing Ramey and would "give [Ramey] a chance to go back to work" (R. 95, 99–101). However, Ramey was not reinstated (R. 97).

II. The Board Conclusions and Order

Upon the foregoing facts the Board, like the Trial Examiner, concluded that the Union, by engaging in a work stoppage on August 5, 1951, for the purpose of forcing the Company to discharge employee Ramey because of the latter's delinquency in dues at a time when no union-security agreement was in effect, violated Sections 8 (b) (2) and 8 (b) (1) (A) of the Act (R. 48). The Board concluded also that the Company, by laying off Ramey on August 5 in accordance with the Union demand and by refusing to reinstate him when he appeared for work the following work day, violated Sections 8 (a) (3) and 8 (a) (1) of the Act (R. 25–26). In finding that the Company had also violated the Act, the Board did not accept the Trial Examiner's view that Ramey "had involuntarily relinquished his job * * * not because of any act of the Company but solely because of the conduct of the * * * Union" (R. 23). However, the Board found that, even assuming, *arguendo,* the correctness of the Trial Examiner's interpretation of the facts, his legal conclusion that

the Company was not responsible under the Act for Ramey's loss of employment was untenable. For in the Board's view, the Company, by its silence and inaction when Ramey yielded to the Union's demand on August 7 that he leave the packing shed, acquiesced in the Union's demand and permitted "the termination of Ramey's employment for discriminatory purposes" (R. 27).

The Board's order requires the Company to cease and desist from encouraging membership in the Union and from in any other manner interfering with, restraining and coercing its employees in the exercise of their rights under the Act, and affirmatively directs the Company to offer Employee Ramey reinstatement. The Union is required to cease and desist from causing or attempting to cause the Company to discriminate against its employees and from in any other manner restraining or coercing the Company's employees in the exercise of their rights under the Act, and is affirmatively directed to notify the Company and Employee Ramey that it is withdrawing its objection to Ramey's employment (R. 31–35).

In addition, both the Company and the Union are ordered to post appropriate notices, and jointly and severally to make Employee Ramey whole for any loss of pay he may have suffered as a result of the discrimination against him (R. 35).[4]

---

[4] Because the Trial Examiner had not recommended that the Comany reinstate Ramey with back pay, the Board, "in accordance with [its] practice," ruled that "the liability of the Respondent Company for back pay will be tolled with respect to the period from the date of the Intermediate Report to the date of the Order herein" (R. 28).

SUMMARY OF ARGUMENT

The Board's finding that the Union violated Section 8 (b) (2) and (1) (A) of the Act by demanding, and calling a work stoppage to enforce its demand, that Employee Ramey be discharged because of his failure to pay dues and maintain his Union membership in good standing, is supported by substantial evidence on the record considered as a whole.

Similarly, the Board's finding that Foreman Hamilton yielded to the Union's demands and on August 5 permanently laid off Ramey until the latter settled his difficulties with the Union is also supported by substantial evidence on the record considered as a whole. Moreover, if it should be assumed that the Company did not discharge Ramey on August 5, the Company's conduct when the Union forced Ramey to leave the packing shed on August 7 constituted an adoption of the Union's action. Upon either view of the facts of Ramey's loss of employment, the Company committed violations of Section 8 (a) (3) and (1) of the Act.

ARGUMENT

Substantial evidence on the record considered as a whole supports the Board's findings that the Company violated Section 8 (a) (3) and (1) of the Act by effecting employee Ramey's discharge, and that the Union violated Section 8 (b) (2) and (1) (A) of the Act by causing the Company to do so

It cannot be seriously doubted, on the foregoing facts, that the Union's successful attempt to have employee Ramey discharged was prompted by Ramey's

failure to maintain his Union membership in good standing because of his delinquency in the payment of dues.[5] Discrimination in the tenure of employment for the failure to pay dues, however, is permitted by

---

[5] During the hearing before the Trial Examiner the Union took the position that its efforts to have Ramey released from his job were not attributable to Ramey's lack of good standing with the Union, but were only an inevitable consequence of its single objective of having the discharge of James Yokas, whom Ramey replaced, rescinded on the grounds that it was not made for good cause (R. 47). The Trial Examiner in his intermediate report rejected this factual contention as unsupported by credible evidence (R. 47–48), and the Union, after being granted two extensions of time in which to file its exceptions to the intermediate report, failed to submit any such exceptions within the period allotted to it (R. 22, 57, 66). Accordingly, the Board adopted the findings and recommendations which the Trial Examiner had made with respect to the Union, and the Union's contention that it did not seek to have Ramey discriminated against because of his delinquency in payment of dues has not been preserved for consideration by this Court. See, N. L. R. B. Rules and Regulations, Series 6, Sec. 102.46 (b); Sections 10 (c) and 10 (e) of the Act; *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385, 389; *Marshall Field & Co.* v. *N. L. R. B.*, 318 U. S. 253, 255; cf. *N. L. R. B.* v. *Noroian Co.*, 193 F. 2d 172 (C. A. 9).

Apart from the failure of the Union to preserve its contention, it is abundantly clear that there is no merit in it. For as we have shown, *supra*, pp. 3–7, Union business agents Cunningham and Feller repeatedly asked Foreman Hamilton to discharge Ramey because of the latter's failure to maintain his membership in good standing, and because the Union intended to enforce closed-shop conditions.

These demands were not in any way made dependent upon the rehiring of Yokas; indeed, as the Trial Examiner found, the Union had conceded that Yokas was justifiably discharged (R. 47, Tr. 90–91). Moreover, if the reinstatement of Yokas was the sole objective of the Union, it would have had no cause to stop work on August 7 to protest Ramey's appearance at the packing shed, for Yokas had then been rehired and was working.

the Act only if a valid agreement which so provide exists between a union and an employer. See provis to Section 8 (a) (3). No contention was made befor the Board, as indeed none could be, that there wa such a contract applicable to Ramey in this case. Fo at the time of Ramey's discharge the Act imposec as a prerequisite to the execution of any contrac which made union membership in good standing condition of employment, the authorization of th employees by means of a referendum procedure (se p. 3, fn. 3, *supra*), and it is conceded that no suc authorization had been obtained in this case (*supr* p. 3). Furthermore, even a valid union-securit agreement could not have affected Ramey's employ ment in the instant case for the Act delays the opera tion of such agreements with respect to new employee for a thirty-day period, and Ramey of course had nc been employed that long. Accordingly, the Union' objective in seeking Ramey's discharge entailed th commission by the Company of a violation of Sectio 8 (a) (3) of the Act, which proscribes discharges o the grounds urged by the Union. And in twice initi ating work stoppages in order to implement its suc cessful effort to compel the Company to yield to it demand, it is clear that the Union transgressed th Act's explicit interdiction against "caus[ing] or at tempt[ing] to cause an employer to discriminat against an employee in violation of subsection (a (3)" of Section 8. Section 8 (b) (2) of the Act *Union Starch & Refining Co.* v. *N. L. R. B.*, 186 F 2d 1008 (C. A. 7), certiorari denied, 342 U. S. 815

N. L. R. B. v. *Newman,* 187 F. 2d 488 (C. A. 2), enforcing 85 NLRB 725.

The Board also correctly concluded that the Company's action, in responding to the Union's economic pressure by putting Ramey off the job, constituted a discharge of Ramey in violation of the Act. Thus, when the Union members stopped work on August 5 to protest against the employment of Ramey because he was not in good standing with the Union, Foreman Hamilton yielded to the Union demand and told Ramey that he "might as well take off" (R. 93). As the Board found (R. 25), this lay-off was intended to be permanent unless the Union relented in its position or Ramey paid his arrearages in dues, and was not intended merely to be a paid vacation for the remainder of the day. The correctness of this finding is demonstrated both by the actions and statements of the Company officials responsible for the lay-off. Thus, immediately after Ramey's dismissal, President Pappas remarked that "we don't want the fellow anyway, he is a trouble maker" (Tr. 111). And Foreman Hamilton, after promising that he would try to "get [the Union] to let [Ramey] go back to work" (R. 117), quickly rehired Employee James Yokas to replace Ramey when it became apparent that the Union would not change its demand that Ramey either pay his dues or be discharged (*supra,* p. 6). Significantly, too, Hamilton interviewed Ramey the day following the lay-off, but did not offer to reinstate him unless he paid his Union dues, since "that way you can come back and go to work" (R. 95).

Finally, the circumstances of the August 5 lay-o wherein Hamilton showed that he was willing to sen Ramey home without loss of wages as the price c securing the Union's cooperation in maintaining pr duction (*supra,* p. 4–5), furnish clear evidence tha Hamilton did not want Ramey at the packing she so long as the Union objected to his presence. Rame himself was fully aware that his dismissal was "final as of that time (R. 101). This impression was cor firmed when, on Monday, the following work da Ramey again appeared at the packing shed in orde to give Hamilton an opportunity to reinstate hi (*supra,* p. 6). The Union work stoppage that im mediately ensued signified to Hamilton that there ha been no change in the Union's position. In turn Hamilton's remark to Ramey that "Well, the boy refuse to work while you are around the shed" (F 93), likewise signified to Ramey that there had bee no change in the Company's position, namely, that i would not offer Ramey employment so long as th Union persisted in its demands. And, of course, "an form of words which conveys to the [employee] th idea that his services are not longer required is suf ficient to constitute a discharge."[6] It was not unti after his discharge had thus been confirmed tha Ramey, to avoid causing further "trouble," left th packing shed (R. 97).

---

[6] *Neid* v. *Tassie's Bakery*, 219 Minn. 272, 17 N. W. 2d 357, 358 see also, *Allgood* v. *City of Oskaloosa*, 231 Iowa 197, 1 N. W. 2 211, 212. Compare *N. L. R. B.* v. *American Potash & Chemica Corp.*, 98 F. 2d 488, 493–494 (C. A. 9), certiorari denied 306 U. S 643; *N. L. R. B.* v. *Sartorius*, 140 F. 2d 203, 205 (C. A. 2); *N. L R. B.* v. *Isthmian S. S. Co.*, 126 F. 2d 598 (C. A 2).

Since the Company's action in laying off and then refusing to reinstate Ramey was prompted by its decision to yield to the Union's demand that Ramey be discharged because of his failure to maintain his Union membership in good standing, the Board properly found that its conduct falls within the interdiction of Section 8 (a) (3) of the Act, which proscribes "discrimination in regard to hire or tenure of employment * * * to encourage * * * membership in any labor organization." See, *N. L. R. B.* v. *Radio Officers' Union,* 196 F. 2d 960 (C. A. 2), certiorari granted 21 Law Week 3107; *N. L. R. B.* v. *Newman,* 187 F. 2d 488 (C. A. 2), enforcing 85 NLRB 725; *Union Starch & Refining Company* v. *N. L. R. B.,* 186 F. 2d 1008 (C. A. 7), certiorari denied, 342 U. S. 815; *N. L. R. B.* v. *Guerin,* No. 12994, decided May 14, 1952 (C. A. 9), enforcing without opinion 92 NLRB 1698; *Colonie Fibre Co.* v. *N. L. R. B.,* 163 F. 2d 65 (C. A. 2); *N. L. R. B.* v. *Jarka Corp.,* 198 F. 2d 618 (C. A. 3).

Moreover, the Company cannot escape responsibility for the termination of Ramey's employment even if it were conceded, *arguendo,* both that Ramey's layoff on August 5 was intended to be merely for the remainder of the day rather than until such time as he should settle his difficulty with the Union, and that Hamilton's statement to Ramey at the time of the August 7 work stoppage did not constitute an express discharge by the Company. As stated *supra,* p. 7, this view of the facts of Ramey's discharge was taken by the Trial Examiner, who exonerated the

Company from the unfair labor practices alleged in the complaint on the ground that Ramey's loss of employment was solely attributable to the Union's coercive conduct, and not to the Company (R. 48–50). The Board noted, however, that the examiner's legal conclusion did not follow even from the facts as he interpreted them.[7] For whatever version of the August 7 occurrences is taken, it is clear that Ramey appeared at the packing shed on that morning to make himself available for work, and that his subsequent departure was not voluntary. Accordingly, if Ramey did not leave because he considered that Hamilton had expressly discharged him, he necessarily left "because of the demonstration against him by the * * * Union" (R. 27). The Union's objective, of course, was to compel Ramey either to establish his Union membership in good standing by payment of his dues, or to terminate his employment altogether. The economic coercion which it brought to bear to attain that objective lay in the deprivation of Ramey's ability to work until he had chosen between the alternatives, for the work stoppage

[7] As is clear from the foregoing recital, the Board did not disagree with the Trial Examiner's findings of fact as to the events and utterances relevant to Ramey's loss of employment. The favored position occupied by the Trial Examiner in evaluating questions of credibility with respect to the facts does not of course extend with equal force to his interpretation of those facts. And on questions of law, of course, he occupies no paramount position. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 496. Cf. *N. L. R. B.* v. *Eclipse Lumber Co. et al.* (C. A. 9, decided November 12, 1952).

resulted in an effective shutdown of all operations at the packing shed (*supra,* p. 4).

Under these circumstances, Ramey's departure at the very least constituted an enforced resignation.[8] And as the Board found, if this version of the facts be assumed the Company's conduct during the critical events of August 7 constituted an unequivocal adoption of the Union's position in its successful attempt to drive Ramey out of the packing shed, and thereby fastened responsibility on the Company as well as on the Union for Ramey's loss of his job. For in demonstrating to force Ramey to quit his employment, the Union was attempting, in the presence of the Company, to usurp "the normal exercise of the *right of the employer* to select its employees or to discharge them." *N. L. R. B.* v. *Jones & Laughlin Steel Co.,* 301 U. S. 1, 45. (Emphasis added.) In these circumstances, either "it was [the Company's] duty to resist such violent domination of *its right and power to employ,*" or to answer for the consequences of the exercise of that right by the Union. *N. L. R. B.* v. *Goodyear Tire & Rubber Co.,* 129 F. 2d 661, 664 (C. A. 5), certiorari granted 317 U. S. 622, and dismissed 319 U. S. 776 (emphasis added). Thus, it is well established that where union groups, in order

[8] There is, of course, no question but that such a resignation, where the employer is responsible and is prompted by discriminatory motives, constitutes a violation of Section 8 (a) (3) of the Act. *N. L. R. B.* v. *Armour & Co.,* 154 F. 2d 570, 576–577 (C. A. 10), certiorari denied, 329 U. S. 732; *N. L. R. B.* v. *Sartorius,* 140 F. 2d 203, 205 (C. A. 2); *N. L. R. B.* v. *East Texas Motor Co.,* 140 F. 2d 404, 405–406 (C. A. 5); *N. L. R. B.* v. *Baltimore Transit Co.,* 140 F. 2d 51, 56 (C. A. 4), certiorari denied, 321 U. S. 795; *N. L. R. B.* v. *Chicago Apparatus Co.,* 116 F. 2d 753, 759 (C. A. 7).

to end the employment of employees whose activities are hostile to the union, physically evict the latter from the employer's premises, the employer who knowingly fails to take any steps to regain his control over the employment relation and to undo the acts of the usurping union groups adopts such acts as his own.[9]

Similarly, in this case, where an employee was "evicted" from his employment by economic, rather than physical, pressure exerted against him by the Union, it was the duty of foreman Hamilton, who possessed complete authority with respect to employment at the packing shed, "to take effective action to assure Ramey that he would be protected in his right to remain at work" (R. 27). Instead, Hamilton manifested an acquiesence in the Union's purpose, and failed in any manner to assert his authority to control employment when Ramey yielded to the

---

[9] See, e. g., *N. L. R. B.* v. *Boswell Co.*, 136 F. 2d 585, 591–592 (C. A. 9); *N. L. R. B.* v. *Weissman Co.*, 170 F. 2d 952, 954 (C. A. 6), certiorari denied, 336 U. S. 972; *N. L. R. B.* v. *Weirton Steel Co.*, 135 F. 2d 494, 495 (C. A. 3); *N. L. R. B.* v. *Goodyear Tire & Rubber Co.*, 129 F. 2d 661, 664 (C. A. 5), certiorari granted 317 U. S. 622, and dismissed 319 U. S. 776; *N. L. R. B.* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 533 (C. A. 6); *N. L. R. B.* v. *Isthmian S. S. Co.*, 126 F. 2d 598, 600 (C. A. 2); *N. L. R. B.* v. *Greenebaum Tanning*, 110 F. 2d 984 (C. A. 7), certiorari denied, 311 U. S. 662.

This consequence flows from the responsibilities that inhere in the employer's authority to control employment. Accordingly, the logic of the Board's conclusion is found in the familiar rationale of the principles of agency, and does not depend, as the Trial Examiner appears to have believed, on an employer's prior "unlawful conduct [which] has incited or encouraged hostility among his employees against one of their own number because of the latter's union affiliation or lack of it * * *" (R. 49).

demonstrators and left the packing shed. The correctness of the conclusion that Hamilton had approved and adopted the Union's position is borne out by Hamilton's subsequent failure to keep his earlier promise to give Ramey a job when work began on Persian melons, even though the latter returned to the packing shed in the hope that he would be given "a chance to go back to work" (R. 101).

Thus, whether the facts in this case are construed to support the conclusion that Hamilton affirmatively discharged Ramey, or that the Company, by its inaction when the Union forced Ramey to quit, relinquished its control over employment to the Union and thereby adopted its actions, the result is the same. In either case, the Company is responsible for the discrimination that caused Ramey the loss of his job, and is, accordingly, guilty of a violation of Section 8 (a) (3) of the Act.

Finally, the conduct of the Company, in effecting Ramey's discriminatory termination from employment, and of the Union, in causing the discrimination, also constitute violations of Section 8 (a) (1) and 8 (b) (1) (A) of the Act, respectively. These sections prohibit an employer (8 (a) (1)) and a union (8 (b) (1) (A)) from restraining or coercing employees in the exercise of their right, under Section 7, "to refrain from * * * join[ing] or assist[ing] labor organizations, * * * and * * * engag-[ing] in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." Manifestly, the loss of employment tenure

because of a failure to pay Union dues and retain Union membership in good standing, is a patent restraint upon the right, which Ramey is guaranteed by Section 7, not to join and assist the Union and not to participate in any of the Union's affairs. See, *Union Starch & Refining Company* v. *N. L. R. B.*, 186 F. 2d 1008 (C. A. 7), certiorari denied 342 U. S. 815; *N. L. R. B.* v. *Automobile Workers, CIO,* 194 F. 2d 698, 702 (C. A. 7).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
ARNOLD ORDMAN,
DUANE BEESON,
Attorneys,
National Labor Relations Board.

DECEMBER 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151, *et seq.*), are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a

labor organization (not established, maintained, or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his repre-

sentatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * * if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

PUBLIC LAW 189, 82D CONGRESS

CHAPTER 534, 1ST SESSION

65 Stat. 601

AN ACT TO AMEND THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, AND FOR OTHER PURPOSES

* * * * *

(b) Subsection (a) (3) of section 8 of said Act is amended by striking out so much of the first sentence as reads "; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:" and inserting in lieu thereof the following: "and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:"

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1952

No. 13444.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PAPPAS AND COMPANY and FRESH FRUIT AND VEGETABLE WORKERS UNION LOCAL 78, and FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA,

Respondent.

BRIEF ON BEHALF OF RESPONDENT PAPPAS AND COMPANY.

MOSS, LYON & DUNN,
210 West Seventh Street,
Los Angeles 14, California,
Attorneys for Respondent.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES PAG

PAGE

MISCELLANEOUS

STATUTES

TEXTBOOKS

No. 13444.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PAPPAS AND COMPANY and FRESH FRUIT AND VEGETABL WORKERS UNION LOCAL 78, and FOOD, TOBACCO AGRICULTURAL AND ALLIED WORKERS UNION O AMERICA,

Respondent.

BRIEF ON BEHALF OF RESPONDENT PAPPAS AND COMPANY.

Statement of the Case.

Facts Bearing on Jurisdiction of National Labor Relation Board.

Respondent, Pappas and Company, is a California cor poration engaged in farming. It is not engaged in an business but farming [Tr. p. 73]. Its farm lands ar located in Fresno County, California, six to nine mile southwest of the town of Mendota [Tr. p. 73]. Whil Mendota is referred to in the transcript as a "city," th

last United States Government Census (1950) shows it to have a population of 1,516. An examination of an atlas shows the town to be located on the west side of the San Joaquin Valley, a vast area containing but a few small, widely scattered towns. Pappas and Company farms approximately 3,500 acres in this area [Tr. p. 74], growing cotton, melons and grain.

The cotton and grain grown by Pappas and Company are not put through a packing shed. The cantaloupe and persian melons, however, immediately following their picking, are hauled by trucks and trailers operated by employees of Pappas and Company [Tr. p. 81] to its packing shed at Mendota [Tr. p. 73] where they are sorted and packed in crates [Tr. p. 82]. The Southern Pacific Railroad has constructed, at the expense of Pappas and Company, a spur track to the packing shed [Tr. p. 75] and the packed crates of melons are placed on railroad cars and iced by the Union Ice Company right at the shed or at the team tract some 100 to 200 yards away [Tr. p. 83]. All of the packing shed personnel are employees of Pappas and Company [Tr. p. 81].

Melons are one of the most perishable crops grown. When they are ready for harvest, they must be picked, packed, placed under refrigeration and started to market immediately, or they will deteriorate to the point where they will have no economic usefulness to the grower. This has long been recognized by the United States Department of Agriculture in its pamphlet on growing of melons,

more extended excerpts from which are set forth in the appendix to this brief. In part, this pamphlet states:

> "After picking, cantaloupes should be hauled without delay from the field to the packing shed, where they should be kept in the shade until packed. They should be packed as soon as possible, and, while being hauled from the packing shed to the car-loading platform, should be covered with canvas or other light-colored cloth to protect them from the sun. As soon as possible, after packing, cantaloupes should be loaded into iced refrigerator cars for shipment."

Pappas and Company handles and packs in its packing shed only melons which it grows. It does not pack melons for or make purchase of melons from any other grower. The transcript of the record on this point reads as follows:

> "Q. Does the company make any purchase of melons from any other grower? A. No.
>
> Q. They receive their melons only from the land that is owned by them is that right? A. That is right." [Tr. p. 84.]

Of the 3,500 acres farmed by the employer respondent approximately 700 to 800 acres are in melons which must be packed [Tr. p. 74].

The value of the land being farmed by the employer respondent is worth in excess of $200,000.00, the value of the packing shed and its equipment is worth about $25,000.00. The cost of the spur track to the packing shed was approximately $3,000.00 [Tr. pp. 74-75].

The farming operations of Pappas and Company go on the year around [Tr. p. 75]. The packing shed operations continue only from mid July to the middle or end of October, during the melon harvesting season [Tr. p. 78].

There is a peak of 100 persons employed in the farming operations [Tr. p. 77], and a peak of about 60 persons engaged in packing [Tr. p. 82].

Pappas and Company packs only the melons it grows and no processing of the melons takes place. The melons are sorted and packed in creates and the crates are then lidded and loaded into refrigerator cars [Tr. pp. 82-83]. The transcript of the record on this point reads as follows:

> "Q. Is there any washing done on the melons at all? A. No. No washing.
>
> Q. Anything done to the melons? A. No." [Tr. p. 83.]

Questions Involved.

The questions involved in this Petition for Review are: (a) Does the National Labor Relations Board have jurisdiction in this matter and (b) If the Board does have jurisdiction, is there any substantial evidence to support the finding of the Board that Ramey was discharged?

ARGUMENT.

I.

The National Labor Relations Board Does Not Have Jurisdiction of This Matter.

A. Pappas and Company Is Engaged Only in Agriculture

A melon grower must pick, haul, pack and sell his melons as one continuous operation in order to make the enterprise a profitable one. The packing and selling are necessary incidents to the growing and picking.

All agriculture is hazardous, but none exceeds the risks entailed in growing, picking, packing and selling cantaloupes and persian melons. Pappas and Company, during the period in question, had a melon crop worth from $400,000.00 to $450,000.00 [Tr. p. 83], but that entire crop could be lost by a single break in any link of the chain of picking, hauling, packing and selling. The grower does not realize any return on his investment until all of these operations have been safely and properly completed, and as pointed out by the Department of Agriculture in its pamphlet on the subject (see appendix) the return to the grower is directly dependent upon the speed and continuity with which all of these tasks are performed.

It is meaningless to say to the farmer, "we are mindful that there are special reasons which exclude your operations from the purview of the statute," and at the same time adopt a definition of the agricultural exclusion which bisects his operations and holds part to be excluded and part to be subject to the Act.

In this case, we have a situation where one labor union which has since "folded its tents and crept silently away"

(and now even the Board appears unable to locate it or effectively enforce its order against it) was willing to call a work stoppage to force one employee in sympathy with another union to pay dues. The most that the union could have lost by this arbitrary position was a few days' employment by its members. What the grower stood to lose was a $400,000.00 melon crop. This situation highlights the wisdom of Congress in excluding "agriculture," by broad definition, from labor regulations applicable to other industry. But, to make that exclusion effective, it must apply to *all* of the agricultural operations of the farmer and not to just a part of them. His agricultural operations do not end until he has harvested, prepared for market and sold the agricultural products which he has grown.

B. Agriculture Has at All Times Been Excluded From the Act.

Section 2(3) of the National Labor Relations Act and also of the Labor-Management Relations Act of 1947, excludes from the term "employee," and therefore from the provisions of the Act "any individual employed as an agricultural laborer." (29 U. S. C. A., Sec. 152 (Subsec. 3).)

By the National Labor Relations Board Appropriation Act enacted July 26, 1946 (and identical limitations in the Appropriation Acts for each year thereafter), Congress has defined the extent of the agricultural exclusion from the National Labor Relations Act as follows:

> "Provided, further, that no part of the funds appropriated in this title shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, direc-

tives or orders concernings bargaining units composed of agricultural laborers as referred to in Section 3(f) of the Act of June 25, 1938 (52 Statutes 1060)."

At the present time, the "National Labor Relations Board Appropriation Act of 1953" contains this limitation on the use of funds (Act of July 5, 1952, Public Law 452, 82nd Congress, Second Session).

Section 3(f) of the Fair Labor Standards Act of 1938 (which has not been amended since its enactment), reads as follows:

> " 'Agriculture' includes farming in all its branches and among other things it includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations), performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

C. The Intent of Congress in the Appropriations Act Was to Broaden the Agricultural Exclusion.

Congress, in 1946, had been dissatisfied for some time with the narrow definition of "agriculture" used by certain governmental agencies, including the National Labor Relations Board, in defining the agricultural exclusion from the acts which they were administering. In 1945, Congress had placed a limitation in the Appropri-

ations Act for the War Labor Board requiring that in excluding agriculture from its jurisdiction the Board use the definition contained in the Social Security Act as amended in 1939. (For a discussion on this point, see the Congressional Record for 1946, pp. 6679 to 6689.)

The National Labor Relations Board Appropriations Act of 1946 was a part of the Independent Offices Appropriations Bill. The bill was first introduced into the House on June 11, 1946 (Congressional Record for 1946, p. 6679.) Representative Elliot of California thereupon offered an amendment providing that no funds should be used in connection with agriculture as defined in the Social Security Act, Section 409 (Title 42, U. S. Code) (Congressional Record for 1946, p. 6689). In support of this amendment, it was stated:

> "This amendment is much needed at the present time in the interest of protecting the processing, handling and production of food stuffs of all kinds on the farms. We all know that we need some clarification in defining agriculture and harvesting and processing in order to properly protect agriculture at this particular time." (Congressional Record for 1946, p. 6689.)

The Elliot amendment was passed by the House, being supported by Phillips, Lea and Anderson, all of California, who stated that it was needed to protect agriculture (Congressional Record for 1946, p. 6689). The amendment was rejected by the Senate. The bill then went to joint conference and was reported back with the House and Senate still in disagreement on this amendment.

When it was reported back to the House, Representative Harness, speaking in support of the Elliot amendment, stated:

> "But there are, in my district and state . . hundreds of smaller processing and packing plan which are in full operation only a few weeks eac year during the harvesting season. These plants a totally non-industrial in all but the most technic sense of this court interpretation. They are almo as truly a direct incident of agricultural productio as the actual harvest in the fields, or the transport tion of produce from field to plant." (Congre sional Record for 1946, p. 9147.)

The matter then again went to joint conference whe it was determined to keep the limitation in the Appr priations Act, but to define the agricultural exclusion terms of Section 3(f) of the Fair Labor Standards A of 1938.

The second conference report went back to the Hou and was accepted without debate (Congressional Reco for 1946, p. 9494).

In the course of the Senate debate on the second joi conference report, the following questions and answe were given:

> "Mr. Pepper: Is the preparation for mark which is exempted that preparation for market whic is carried out on a farm or as an incident to a farm ing operation?
>
> Mr. McCarran: Mr. President, I will say to th Senator that that is the construction the committe put upon it." (Congressional Record for 1946, p 9514.)

The second joint conference report was adopted by the Senate on July 23 and was signed into law by the President on July 26, 1946.

The same limitation in the Appropriations Act for the National Labor Relations Board has appeared each year since 1946.

This court in *National Labor Relations Board v. Thompson Products Co., Inc.,* 133 F. 2d 637 (9th Cir., 1944), states:

> "That Congress can amend substantive legislation by provisions in an Appropriations bill is not questioned. *United States v. Dickerson,* 310 U. S. 554, 555."

In this instance, it is quite apparent from the statements of those Congressmen in charge of the bill that they intended to make a substantive change in the National Labor Relations Act by this limitation in the Appropriations bill. This is further substantiated by the fact that Congress has each year since then re-enacted the limitation in the then current Appropriations Bill, thereby evidencing an intent that this be a permanent part of the legislation. This position is still further substantiated by the House conference Report on the Joint Conference agreement reached on the Labor-Management Relations Act of 1947. In this report, it is stated:

> "The conference agreement in general follows the provisions of the Senate amendment with the following exceptions:
>
> (A) Since the matter of the 'agricultural' exemption has for the past two years been dealt with in the Appropriation Act for the National Labor Relations Board, the conference agreement does not disturb existing law in this respect."

D. Court Cases Interpreting "Agricultural Laborer" a Exempt From the Act Prior to July 26, 1946.

Since there has been an apparent substantive change i the agricultural exemption from the National Labor Rela tions Act and the Labor Management Relations Act afte July 26, 1946, this brief has been divided to discuss th cases bearing on the agricultural exclusion from the Ac (a) under the Act as it existed prior to the limitation i the National Labor Relations Board Appropriations Ac of July 26, 1946, and (b) after this limitation had gon into effect. It is our position, however, that the labo here involved is agricultural labor both under the Act a it existed before and after July 26, 1946.

The case decided under the law as it existed prior t July 26, 1946, which is practically identical on its fact with the instant one, is *National Labor Relations Boar v. Campbell,* 159 F. 2d 184 (5th Cir.). Although thi case was decided January 2, 1947, it discusses the agr cultural exemption as it existed in general language prio to the adoption of Section 3(f) of the Fair Labor Stand ards Act. The facts in the *Campbell* case are stated b the court at page 185, as follows:

> "Respondent is extensively engaged in growin tomatoes on a farm of approximately 1,000 acre near Goulds, Florida, and as an adjunct to whic it operates its own packing house wherein the prod ucts of its farm are washed, graded and packed fo market.
>
> The growing and packing of tomatoes is seasonal They are highly perishable, admitting of little dela in gathering, packing, shipping and marketing.

> With the exception of a short time at the end of the packing season in 1944, the respondent had never engaged in the packing of any agricultural products except those grown on its farm."

Based on these facts, the court goes on, at page 187, to hold as follows:

> "Congress, as well as this court, has recognized that the packing and preparing of agricultural products for market is a necessary incident to any agricultural operation, for no farmer, dependent upon that which he produces to sustain his operations, could long exist if he could not market that which he produces, and so long as the operation of washing, packing and preparing for market by employees of the farmer is on that only which he has produced on his farm, it is a necessary incident to farming and is agricultural labor."

The court, in the *Campbell* case, rejected the argument that the size of the operation made it commercial instead of agricultural and at page 187 states as follows:

> "The argument that respondent has 1,000 acres planted in tomatoes and grows, packs and markets many carloads in a season, and because of the very nature and size of its operations, should be held to be engaged in an industrial enterprise, as distinguished from the pastural pursuits of the farm, will not do. The exemption was not restricted to the 40-acres-and-a-mule farmer. It is not measured by the magnitude of his plantings nor in the prolificacy of his harvest."

The cases of *North Whittier Heights Citrus Association v. National Labor Relations Board,* 109 F. 2d 76 (1940); *National Labor Relations Board v. Tovrea Packing Co.,* 111 F. 2d 626 (1940), and *Idaho Potato*

Growers v. National Labor Relations Board, 144 F. 2d 295 (1944), decided by this court, are not relevant to the facts in this case.

North Whittier Heights Citrus Association v. National Labor Relations Board, 109 F. 2d 76 (cert. den., 310 U. S. 632, 84 L. Ed. 1402, 60 S. Ct. 1075), involved the packing of oranges by a cooperative association which was a separate corporate entity from the growers, created for the purpose of marketing their fruit. At page 80 the court states:

> "The packing house activity is much more than the mere treatment of the fruit. When it reaches the packing house, it then is in the practical control of a great selling organization. . . ."

The *North Whittier Heights Citrus Association* case is consistent with other Federal cases, cited under the Fair Labor Standards Act's agricultural exclusion, to the effect that a cooperative association is a separate legal entity from the growers or farmers that compose its membership. (See Annotation in 170 A. L. R. 1250 for similar cases interpreting the agricultural exclusion under the Fair Labor Standards Act.)

In *National Labor Relations Board v. Tovrea Packing Co.,* 111 F. 2d 626, the court, at page 627, states that:

> "Respondent is engaged in the general meat packing business. It purchases, feeds, slaughters, processes, and markets livestock."

In the *Tovrea* case, the employees involved were employed in the feeding mill, adjacent to the packing plant, which

fed mainly purchased stock. On this point, the court, at page 628, states:

> "Most of the stock fattened on the ranches is not marketed in any way through the packing plant, and most of the stock fattened in the feeding pens adjacent to the packing plant comes to it from sources other than the ranches to which reference has been made."

Under these circumstances, the court held that the feeding mill was incidental to the packing plant and its operation rather than incidental to the farming or ranching operations of respondent.

Idaho Potato Growers v. National Labor Relations Board, 144 F. 2d 295 (cert. den., 323 U. S. 769, 89 L. Ed. 615, 65 S. Ct. 122), involved a group of respondents, none of which came within the category of a grower preparing for market only the potatoes which he himself has grown. The court described the business of the respondents as follows:

> "All of the respondents except the Traffic Association, being herein at times called respondent dealers, are dealers in potatoes in Idaho Falls, Idaho, and vicinity. The respondent dealers, except the Potato Growers, customarily buy lots of potatoes from other dealers and farmers in the vicinity, and pack, load, ship and resell them. The respondent Potato Growers being a cooperative enterprise does not buy the potatoes in which it deals but ships them for the account of farmers, both members and non-members, and of other dealers with all of whom it ordinarily makes final settlement at the end of the season."

In other words, in the *Idaho Potato Growers* case, all o the respondents either came within the type of operatio discussed in the *Tovrea Packing Co.* case or within th type of operation discussed in the *North Whittier Height Citrus Association* case. None of them came within th type of operation discussed in the *Campbell* case.

It is quite obvious that the facts in this case brin it within the rule of *National Labor Relations Board v Campbell,* 159 F. 2d 184, and that the facts in the *Nort Whittier Heights* case, the *Tovrea Packing Co.* case an the *Idaho Potato Growers* case are at variance with th facts in the instant case.

E. National Labor Relations Board Cases Interpretin "Agricultural Labor" as Exempt From the Act Prior t July 26, 1946.

While the courts prior to July 26, 1946, made the dis tinction between a farmer merely packing or preparin for market the produce which he himself had grow and the packing of such produce by another, either afte purchase or for the account of the farmer, the Boar failed and refused to make such a distinction. The case of *American Fruit Growers, Inc.* (1938), 10 N. L. R B. 316, and *Averill* (1939), 13 N. L. R. B. 411, involve groups of respondents some of whom were commercia packers of lettuce and others of whom merely packe what they grew. The Board held *all* such packing labo to be non-agricultural, stating that the packing was no performed as an incident to the farming operations bu as a commercial operation. Apparently, in the case o the packing of the lettuce by those who packed only wha they grew on their own farms, the Board held the packing

to be commercial because it was incidental to the selling of the produce. Apparently, under this strange reasoning, when the farmer sold what he grew, he ceased to be engaged in agriculture and became engaged in a commercial enterprise.

As pointed out in Section C of this brief, this strained and limited definition of agriculture used by the Board resulted in Congress, in 1946, forcing the Board into a more reasonable and adequate definition of agriculture by placing a limitation of power in the Appropriations Act.

F. National Labor Relations Board Cases Interpreting "Agricultural Laborer" as Exempt From the Act After July 26, 1946.

Since July 26, 1946, the Board has followed a vascillating policy in defining agricultural labor and agriculture as excluded from the Act. This vascillating policy can be illustrated no better than by quoting from the Board's own decision, *In the Matter of Imperial Garden Growers, Employer, and Fresh Fruit and Vegetable Workers, Local Union No. 78, Petitioner,* Case No. 21-RC-1183, 91 N. L. R. B. 1034, decided October 18, 1950. This case involved packing shed labor engaged in packing lettuce which the farmer grew. In determining whether this constituted agricultural labor as excluded from the Act, the Board states:

> "In a number of cases decided under the Wagner Act before July, 1946, the Board directed representation elections among the packing shed employees of fruit or vegetable packers engaged in operations similar to those of the employer. This continued to be the Board's practice until, in July, 1946, a rider to

the Board's Appropriation required the Board to de fine 'agriculture' as defined in Section 3(f) of th Fair Labor Standards Act. The Board then modifie its policy. Thus, although the Board continued t assert jurisdiction over packing shed workers wh were engaged in packing produce not grown by thei own employer, or where the processing materiall changed the product to enhance its market value, ceased by 1948, to assert jurisdiction over packin shed workers where neither of these factors wa present.

"In the present case, we have reconsidered and re evaluated these later decisions, and have considere the interpretation of Section 3(f) of the Fair Labo Standards Act by the Wage and Hour Division o the Department of Labor."

After discussing the tests used by the Administrator i determining whether certain activities constituted agricu tural labor under Section 3(f) of the Fair Labor Stand ards Act, the Board thereupon concluded that it had bee wrong in its decisions between 1946 and 1950, and fo all practical purposes, went back to the position which had taken prior to the 1946 Appropriations Act.

The question now arises, was the Board correct in it interpretation of agriculture which it used between 194 and 1950 or is it correct in its present interpretation This, in turn, in our opinion, depends upon the prope interpretation of Section 3(f) of the Fair Labor Stand ards Act and upon the pursuasiveness to this court o the interpretation of 3(f) of the Fair Labor Stand ards Act made by the Wage and Hour Administrato in his "Interpretive Bulletin No. 14." We will proceed to discuss these points.

G. What Is Meant by the Term "Agriculture" as Defined in Section 3(f) of the Fair Labor Standards Act.

(1) Analysis of the Definition.

Section 3(f) of the Fair Labor Standards Act of 1938 has not been amended since the Act was first passed. It has been quoted in full under Section B of this brief. At this point, we simply wish to analyze the portion of the definition applicable to the facts in this case.

The portion of the definition applicable to the facts in this case is the so-called secondary portion of the definition which includes as agriculture:

> "any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market . . ."

It will be first noted that this portion of the definition is stated in the disjunctive in order to make it as broad as possible. The practices may be performed by a farmer *or* on a farm. If the practices which are exempt are performed on a farm, they need not be performed by the farmer; on the other hand, if the practices which are exempt are performed by the farmer, they need not be performed on the farm. The practices must be carried on as an incident to *or* in conjunction with such farming operations. We read the purpose of this last disjunctive provision as one to broaden the definition. In some instances, there may be a question as to whether a given practice is performed "as an *incident* to" the farming operation, but if it is performed "in conjunction with" the farming operation, then it is agricultural. Congress, by this definition, gave every evidence of its intent that it be broadly construed and that certain words could

not be seized upon in order to limit its construction
In the instant case for example, we have no doubt bu
what the melon packing is carried on as an incident t
the farming operation, but there can be no doubt in an
one's mind that it is carried on in conjunction with suc
farming operations. Webster defines "conjunction" a
an act of conjoining; union; association; combination; c
as concurrent, as of events. In other words, the packin
must be carried on in union or association or combinatic
or in concurrence of time with the farming operatio
The facts in this case show that this is done and the fac
set forth in the United States Department of Agricultu
Bulletin, quoted from in the appendix to this brief, sho
that this must be done if the farmer is to have a marke
able crop.

(2) Administrator's Interpretation of the 3(f
Exemption as Contained in His Interpretativ
Bulletin No. 14.

"Interpretative Bulletin No. 14" of the United State
Department of Labor, interpreting "agriculture" as ex
empt from the Fair Labor Standards Act, was issued i
December, 1940, and has not been revised since that tim
Copies of this Interpretative Bulletin obtained from th
United States Department of Labor have stamped on th
cover the following statement:

> "This document represents the view of the Admi
> istrator as of the time of its issuance. Because c
> subsequent court decisions, statutory changes, . .
> it may not at the present time."

At page 5 of this Bulletin, he takes up "practices . . . performed by a farmer." On this point, he says, in part, as follows:

> "The agricultural exemption, however, would seem to include only practices which constitute a subordinate and establish part of the farming operations. Factors that would indicate that the practices performed by a farmer are thus subordinate would be, among other things, that most of the employees engaged in such practices are normally employed also in farming operations on the farm, and that these practices occupy only a minor portion of the time of the farmer and such employees and do not constitute the farmer's principal business."

In other words, the Administrator in effect states that if the packing is done other than by general farm labor, it is not agricultural. If it is done by persons who do not interchange with the farm labor, it is done by persons who are engaged in a special occupation or special trade and it therefore does not constitute agriculture and they are not engaged in agricultural labor.

It is upon this interpretation that the National Labor Relations Board now relies in holding labor such as this and as in the *Imperial Garden Growers* case (*supra*) not to be in agriculture.

(3) The Legal Effect of Administrator's Interpretative Bulletin No. 14.

In *Skidmore v. Swift & Company,* 323 U. S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944), the court, at page 140, had this to say regarding the weight to be given the Administrator's interpretation of a particular provision of the Fair Labor Standards Act:

> "The weight of such a (the Administrator's) judgment in a particular case will depend upon th thoroughness evident in his consideration, the validit of its reasoning, its consistency with earlier and late pronouncements, and all those factors which give i power to persuade, if lacking power to control."

In *Jewell Ridge Coal Corporation v. Local No. 6167* 325 U. S. 161, 65 S. Ct. 1063, 89 L. Ed. 1534, the cour held that the position of the Administrator being legall untenable, it would not be given the respect to which i is usually entitled. In the final analysis, the Administra tor's interpretation is entitled to no more consideratio than its persuasiveness justifies.

(4) The "Special Trade" Limitation Placed o Agriculture in Interpretative Bulletin No 14 Is Not in Harmony With Court Decision

One of the earlier cases on this point is *Miller & Lux Inc. v. Industrial Accident Commission,* 179 Cal. 764, 17 Pac. 960, 7 A. L. R. 1291 (1919). The single questio for decision was stated by the court, at page 766, to be "whether or not a workman whose sole duty is to repai wagons in a shop operated on a farm for the purpose o keeping the agricultural implements and vehicles used i the farm in order, is engaged in farm or agricultura labor within the meaning of" said Act. At page 767 the court states:

> "The law of California has exempted the farming industry from the operation of this statute, and i a worker on a farm may be reasonably classified a one engaged in agriculture, his employer is clearl entitled to the benefit of this exemption. While it i true that an employer may be engaged in several sort

> of industry, some of them within and some without the purview of the Compensation Act, and that an employee may at different times do work of one kind or the other, it is equally a fact that where from the great extent and complexity of farming operations on a given rancho, the work of the farmers is classified and each is given a limited, rather than a diversified duty, that circumstance alone will not make some of them artisans rather than agriculturalists."

A more recent California case on the subject is *Irvine Co. v. California Employment Commission,* 27 Cal. 2d 570, 165 P. 2d 908 (1946). In this case, the respondent owned and operated a large ranch of which some 97,000 acres were used for farming purposes. At page 573, the court states the facts as follows:

> "To facilitate its work of preparing the land for cultivation, raising and marketing crops, maintaining buildings and equipment, and keeping records, respondent has for greater efficiency, arranged a division of labor by assigning special duties to certain of its employees."

Then, at page 581, the court goes on to hold as follows:

> "Moreover, and as an independent consideration, it is a settled principle of statutory construction that a Legislature in legislating with regard to an industry or an activity, must be regarded as having had in mind the actual conditions to which the Act will apply; that is, the customs and usages of such industry or activity. At the time the Unemployment Insurance Act was adopted in this state in 1935, there were many large ranches producing agricultural crops by the employment of mechanized equipment, *with a division of labor,* and by using irrigation, reclamation and drainage. When, then, the legisla-

ture, in adopting the language of the Act, created a exception by the use of the general term 'agricul tural labor,' it must have had the large ranches i mind as well as the smaller farms; and while the bas words are not defined in the Act, they are also nc limited, so that it is unreasonable to suppose that i was intended to narrow the exemptions to small farm or to hand labor or to any particular part of th labor then being generally used on ranches and farm by the owners or tenants thereof. . . .

Agriculture, like industry, has developed, changec and grown under modern conditions incident to th adoption of new methods and the advent of improve machinery, including the use of electrical power an the internal combustion engine. This has also brough about, in some cases, changes in the methods an ways of doing the necessary work in carrying o agricultural operations. While, of course, there sti exists the small farm operated mainly by hand labo and horse drawn implements, the use of power ma chinery and more varied equipment is now genera on large and medium sized farms and to some exten even on smaller farms. A large part of agricul tural production takes place on large farms, the effi cient operation of which would, in many instances have been impossible a generation ago, and whic systematically utilize modern methods and machin ery. But, despite such changes in methods an means of operations, they are still agricultural en terprises and are operated for the purpose of produc ing agricultural crops. It may fairly be said tha the determinative consideration here is whether th act in question contemplated 'agricultural labor' unde the conditions then actually existing and well know to the legislature, and as broadly applying to th

business of agriculture in its entirety, or whether the general exemption was intended to be limited to 'agricultural labor' under primitive conditions or as pursued a century or more ago, and to apply only and so far as those conditions and methods may still survive. Reasonably viewing the generality of the term, it would seem that it was intended to cover and apply to the conditions prevailing when the Act was adopted and under which agriculture now flourishes throughout the state." (Emphasis added.)

Under the Social Security Act, as it existed before the 1939 amendments, agriculture was exempted from the Act without definition. A definition of the exemption was contained in Regulations 90 and 91 of the Treasury Department. These regulations contained a "special trade" provision excepting special trades from the agricultural exemption. (Federal Bureau of Internal Revenue Rulings, 127 S.S.T. 125, C.B. 1937-1397; 423 S.S.T. 368, C.B. 1939-1 part 1298.) But, in three federal cases where the question of classification arose with reference to services performed during those years, it was held that persons employed by farmers and for farm purposes were engaged in agricultural labor even though it might properly be said that they were pursuing special trades. These cases were *Jones v. Gaylord Guernsey Farms,* 128 F. 2d 1008; *Stuart v. Kleck,* 129 F. 2d 400; *Latimer v. United States,* 52 Fed. Supp. 228.

In *Jones v. Gaylord Guernsey Farms,* 128 F. 2d 1008 (1942), the defendant, Gaylord, operated an 800 acre dairy farm and in connection therewith employed persons to feed and milk the cows, to cool and bottle the milk and to sell the milk by retail routes. The court stated that the term "agricultural labor" must be given

an interpretation "broad enough to embrace agricultur as that term is understood wherever the calling is fol lowed." The court said there were two tests to deter mine whether certain work constituted agricultural la bor—(1) the nature of the services rendered, and (2) the dominate purpose. It held in that case that the domi nant purpose was the operation of a large dairy farm and that all of the labor above mentioned was inciden thereto and exempt, despite the contention by the Com missioner that it was a "special trade."

In *Stuart v. Kleck,* 129 F. 2d 400 (9th Cir., 1942) the employees were engaged in leveling land and con structing dams and reservoirs for impounding water Even though this was all specialized work, the employee using large pieces of machinery and equipment, it wa all held to be agricultural labor.

In *Latimer v. United States,* 52 Fed. Supp. 228, th court had before it various classifications of labor b four different plaintiffs. One of these plaintiffs wa Rancho Sespe, a California corporation, which operated 4,100 acre ranch in Ventura County. The court, at pag 236, held that the carpentry, mechanical and blacksmith work and repair and maintenance of machinery an equipment in connection with growing, transporting t the packing house and packing fruit, were all exempt a agricultural labor, despite the contentions of the Com missioner that they were specialized occupations. Th court used the same test as in the *Gaylord* case, namely

that the dominant purpose and business of Rancho Sespe was farming citrus products and the correlated activities in connection therewith, carried on by the employees of Rancho Sespe, were also agricultural labor.

From the above cases, it is obvious that the courts have refused to recognize the distinction made by the Administrator in his Bulletin 14 and have consistently held that the fact that an employee has specialized duties in connection with the farming operations, does not prevent such an employee from being engaged in agriculture.

H. The Courts Have Consistently Held That the Term Agriculture and the Definition of Agriculture as Contained in Section 3(f) of the Fair Labor Standards Act Are to Be Broadly Construed.

The courts have consistently held that the term "agriculture" is one of broad import to be broadly construed. In *United States v. Turner Turpentine Co.,* 111 F. 2d 400, 404-405, the court stated that when Congress used the term "agricultural labor" it:

> "intended (the term) to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, as that term is understood in the various sections of the United States where the Act operates . . ."

When Congress itself has defined "agriculture" in a statute, the definition has been broad, as in the Fair Labor Standards Act and the Social Security Act. The courts have recognized the intent of Congress in these definitions and have broadly interpreted them as exclusions from the

Act. In *Waialua Co. v. Maneja,* 178 F. 2d 603 (1949, 9th Cir.), certiorari denied 339 U. S. 920, 94 L. Ed. 1343, 70 S. Ct. 622, this court discussed the broad exclusion of agriculture from the Fair Labor Standards Act contained in Section 3(f) of that Act. In *McComb v. Hunt Foods, Inc.,* 167 F. 2d 905 (1948, 9th Cir.), certiorari denied 335 U. S. 845, 93 L. Ed. 395, 69 S. Ct. 69, this court quoted from the opinion of the lower court as follows:

> "The policy of protection to the growers of 'perishable and seasonal fresh fruits' is of as much force as that of the protection of the general industrial workers. The objective of the uniform rule for hours and wages in manufacturing should not be allowed to prevail over the paramount necessity of garnering and preserving fruits and grains and the protection of those who grow them when Congress equally recognized both in the Act."

The court then, at page 908, goes on to state:

> "We agree with the conclusion of the trial court that the 'remedial' provision applies to the activities excepted by the statute to the same degree and in as full measure as those which by their nature were intended to be brought in their entirety, within the orbit of the statute, if it is made clear by the evidence that the claim of exception is supported by adequate proof. In such a case, the act is 'remedial' as to the activities claimed and proven to be excepted, and its remedial provisions inure to the benefit of those shown to be engaging in such excepted activities."

In *Damutz v. Wm. Pinchbeck, Inc.,* 158 F. 2d 882 (1946, 2d Cir.), 170 A. L. R. 1246, it was stated that Section 3(f) of the Fair Labor Standards Act was in-

tended to cover much more than ordinary farming activities. At page 883, the court states:

> "It (the statute) is drawn in far reaching language which shows the intent of Congress to make the term 'agriculture' cover much more than what might be called ordinary farming activities."

The courts have consistently held that when a farmer packs or prepares for market only the produce which he has grown, such labor constitutes agricultural labor. This statement of law is set forth in an Annotation in 170 A. L. R. 1250, as follows:

> "Where an employer's business regularly involves the handling of, or other work in connection with, commodities grown by others, those activities are not a practice incidental to farming even though the handling of his own grown commodities would be incidental to his farming operations. (Cases cited.)
>
> Contrarywise, employees' handling of, or other work in connection with, commodities grown by the employer and not yet placed in transportation, except possibly to carry them to local markets, is regarded as 'employment within agriculture' within the statutory exemption." (Cases cited.)

II.

No Unfair Labor Practice Was Committed by Pappa and Company.

The Trial Examiner found that there was no discharg of Ramey by the company. In his Intermediate Repor the Trial Examiner states:

> "Hamilton refused every demand made on him b representatives of the F. T. A. to discharge Rame and to reinstate Yokas in his place." [Tr. p. 48.

The Board, however, found that the respondent em ployer on August 5, laid Ramey off at the instance of th respondent union and on August 7 rejected his reques for reinstatement [Tr. p. 26]. Member Reynolds dis sented from the opinion of the Board and adopted th recommendation of the Trial Examiner [Tr. p. 36].

There is no substantial evidence to support the findin of the Board that Ramey was discharged by the employe either on August 5 or August 7.

Ramey's own testimony on the subject is as follows He was first employed by the company on Wednesday August 2, 1950 [Tr. p. 84]. On Friday, August 4 Feller of the F. T. A. Union came around for a "bool inspection" (*i.e.,* to collect dues) [Tr. p. 87].

Both Feller and Cunningham of the F. T. A. Unior came around on Saturday, August 5, regarding dues and were unable to collect from Ramey [Tr. pp. 88-89].

Sometime before 4:00 P. M., Saturday, August 5th work stopped in the packing shed and Ramey, who worked on the outside, went in to see what had happened He heard Feller say, "Well, this is the reason we called this shutdown—there's a man working outside that don'

even belong to the Union" [Tr. p. 91]. This led to a fracas and name calling between Ramey and Feller. Ramey went on to testify:

> "Well, they insisted that Hamilton give me my check and pay me off. He said 'no, I don't think that is right.'" [Tr. p. 91.]

After more conversation, Hamilton stated that he thought Ramey had as much right to work as anybody [Tr. p. 92], and Ramey walked out and started back to work on the outside. Thereupon, Hamilton came out and said to Ramey:

> "The boys refuse to go back to work until you are off the shed so you might as well take off. I will go ahead and pay you for the rest of the day and I hope something will develop and you will go back to work over the weekend." [Tr. p. 93.]

This was about 4:00 P. M. and Ramey would normally work until about 5:00 P. M.

The shed did not operate on Sunday [Tr. p. 120], so the next working day was Monday, August 7th.

Monday morning, Ramey arrived at the shed about 7:00 A. M. before work had begun, in the company of Mr. Gillie and Mr. Crabtree, both representatives of the C.I.O. Union that was backing Ramey in the jurisdictional dispute. Ramey testified that he was told to go down there at that time to see, "if I am still on the payroll" [Tr. p. 95].

The packers refused to go to work while Ramey was on the shed and he was so informed by Hamilton and thereupon Ramey stated:

> "I am getting off. I don't want to cause any trouble."

He thereupon turned and left the shed and does no know what went on after that [Tr. p. 97].

He waited until the regular payday for his check and then went down and got it [Tr. p. 97].

Prior to Ramey leaving the shed, however, Gillie had asked Hamilton, in Ramey's presence, "Is this man fired or discharged?" Hamilton had answered, "He was neither" [Tr. p. 102].

Hamilton testified regarding the events resulting in the alleged illegal discharge as follows:

He was the shed foreman for Pappas and Company [Tr. p. 112]. On Saturday, August 5th, about the middle of the afternoon, Chuck Feller asked Hamilton if he couldn't get rid of this Ramey and Hamilton replied he couldn't [Tr. p. 114]. A little later, Duke Cunningham of the same F. T. A. Union made formal demand for discharging Ramey and Hamilton again replied that he couldn't [Tr. p. 115]. When it appeared that the packers were not going to go back to work, Hamilton told Ramey to take the afternon off and he would pay him for that afternoon and in the meantime he would try to get it settled. So Ramey left and the packers went back to work [Tr. p. 117].

Monday morning, August 7, Ramey was present and the crew refused to go to work if he was on the job. So Ramey said, according to Hamilton: "If they don't want to work, well, I will leave, I will leave the shed I won't cause any trouble." [Tr. p. 119.]

We submit that there is no substantial evidence to support the Board's finding that Ramey was discharged on Saturday, August 5th.

Hamilton testified that although he was importuned and pressured to discharge Ramey, he consistently replied that he could not.

Ramey testified that, "They insisted that Hamilton give me my check," but he did not. When Ramey was paid, he was paid on the regular payday [Tr. pp. 91 and 97].

It is the law in the State of California, and this law is well known to working men, that when a man is discharged, he must be paid his check immediately. This is so well known to working men that it has become common parlance for the foreman in discharging employees to say "Go into the office and get your check," instead of, "You are discharged." That is why the F. T. A. Union officials were insisting that Hamilton give Ramey his check. Strong evidence against the fact of a discharge then exists in the evidence that (a) Hamilton at all times refused to then and there give Ramey his check, (b) Ramey did not demand his check, thereby evidencing stronger than words that he did not consider himself discharged, and (c) Ramey, although he was being advised by his C.I.O. representatives, did not, either on Saturday, or Monday, demand his check but waited to be paid on the regular pay day which is the usual procedure when a man quits his job.

The Board has further stated that if Ramey was not discharged then at least the employer knowingly permitted the exclusion of an employee from the plant and this was a violation of the Act. This contention is answered by the statement of the Trial Examiner in his Intermediate Report, where he says:

> "If Ramey had not volunteered to leave his employment, rather than cause trouble, but had stood

> on his right to remain unmolested on his job, and the respondent company had required him to leave, or had refused to afford him such protection as was necessary to secure him in that right, a different situation might be presented, though it is difficult to see what the company could have done short of closing down its plant." [Tr. p. 49.]

In other words, Ramey did not force the company into the position of having to protect him as an employee. Perhaps he could have done that. Instead, let it be said to his credit, he chose to leave voluntarily rather than to put the company in the unenviable position where it would have to close down its packing shed in order to protect his employment status.

In closing, we must protest the dictatorial decision of the Board that, "It was the duty of the company to take effective action to assure Ramey that he would be protected in his right to remain at work." [Tr. p. 27.] Take what action? Close down its packing shed and lose a $400,000 melon crop? This situation graphically underscores the wisdom of Congress in excluding agriculture from the jurisdiction of the National Labor Relations Board.

Fortunately, however, in this case, Ramey did not force the employer to the requirement that he lose his melon crop in order to protect him in his job. Before Ramey would do that, he was willing to leave the packing shed and not force the employer to discharge him or protect him in his job.

Respectfully submitted,

Moss, Lyon & Dunn,
By George C. Lyon,
Attorneys for Respondent.

APPENDIX.

"More Care Is Needed
in Handling
Western Cantaloupes

George L. Fischer
Investigator,
and
Arthur E. Nelson,
Assistant in Marketing
United States Department of Agriculture
Bureau of Markets
Charles J. Brand, Chief

Markets Doc. 9 Washington, D. C. May, 1918

Cantaloupes Should Be Loaded Into Iced Refrigerator Cars As Soon As Possible After Picking.

The reduction of serious market losses from oversoft, overripe, and decayed cantaloupes is dependent to a large extent upon the promptness with which they are placed under refrigeration. The importance of prompt loading and cooling is generally recognized. The inspection data of experimental shipments of Pollock cantaloupes from the Imperial Valley to New York City during the seasons of 1916 and 1917 strongly emphasize this factor.

Table 3 gives the average results of inspections of 13 shipments of comparative lots delayed one, four and eight hours before loading during the season 1917.

Table 3.—Average percentages illustrating differences in firmness, color and decay of cantaloupes delayed for one, four, and eight hours before loading into iced refrigerator cars for shipment, season 1917.

Time of inspection at New York City	Just after unloading from refrigerator cars			Two days later.		
Viewpoint of Inspector	Dealer			Consumer		
Time between packing and loading into iced refrigerator car for shipment	1 hr.	4 hrs.	8 hrs.	1 hr.	4 hrs.	8
Cantaloupes:	Per Cent	Per Cent	Per Cent	Per Cent	Per Cent	Pe
Too Soft to be desirable	8.4	16.7	27.0	30.6	37.7	
Too Yellow from standpoint of ripeness	8.4	13.3	15.0	20.9	21.5	
Decayed enough to spoil for food	.0	.0	1.2	2.9	3.3	

After picking, cantaloupes should be hauled without delay from the field to the packing shed, where they should be kept in the shade until packed. They should be packed as soon as possible, and, while being hauled from the packing shed to the car-loading platform, should be covered with canvas or other light-colored cloth to protect them from the sun. As soon as possible, after packing, cantaloupes should be loaded into iced refrigerator cars for shipment."

No. 13444

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PAPPAS AND COMPANY AND FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78, AND FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
ARNOLD ORDMAN,
DUANE BEESON,
FRANKLIN C. MILLIKEN,
Attorneys,
National Labor Relations Board.

To be argued by:
Mr. BEESON.

INDEX

Miscellaneous—Continued

In the United States Court of Appeals for the Ninth Circuit

No. 13444

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PAPPAS AND COMPANY, AND FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78, AND FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

For the first time in these proceedings respondent Company urges in its brief before this Court that its employees are agricultural laborers and hence not entitled to the protection of the Act. The contention is predicated on the exclusionary language of Section 2 (3) of the Act and on the limitations attached to the Board's appropriation bill in effect during the processing of this case. The opportunity to raise this issue before the Board was available at each step of the proceedings, but the Company made no effort to utilize it. Thus, the Company filed no answer to the Board's complaint which clearly alleged that the em-

230201—53——1

ployees involved were protected by the Act (R. 9–13); it declined to produce evidence or examine witnesses in order to adduce facts pertaining to the contentions it now makes; it refused the trial examiner's invitation at the close of the hearing to "make a statement for the company" (Tr. 128);[1] and it failed to file exceptions to the trial examiner's intermediate report, in which the Company's employees were determined to be within the Act's protection (R. 42, 51, 52). Accordingly, the Board has had no occasion to pass on the merit of respondent's contention.[2]

In these circumstances, the question the Company belatedly attempts to raise falls squarely within the

[1] This refusal occurred at the close of the hearing in the following colloquy between the trial examiner and representatives of the parties (Tr. 127–128):

Trial Examiner SPENCER. Do you care to argue the merits of the case?

Mr. MAGOR (counsel for the Board). I think the merits are more or less presented before the Trial Examiner in the record sufficiently.

Trial Examiner SPENCER. How about you, Mr. Gillie?

Mr. GILLIE (counsel for the charging party). Satisfied.

Trial Examiner SPENCER. Mr. Burke?

Mr. BURKE (counsel for the Union). We are also.

Trial Examiner SPENCER. Do you wish to make a statement for the Company?

Mr. WARKENTINE (representative of the Company). No.

Occasional references in this brief to testimony not reprinted in the record are documented, as here, by setting forth the relevant passages in a footnote. These passages were not designated to be printed in the record because, as stated in the text above, the Company did not indicate at any time while this case was before the Board that it intended to raise the question to which such testimony is relevant.

[2] Like the Company, the Union also did not raise the question before the Board of whether the employees here involved were agricultural workers.

restrictive language of Section 10 (e) of the Act which provides that "No objection that has not been urged before the Board, its member agent, or agency, shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." At no time has the Company attempted to excuse its dereliction "because of extraordinary circumstances," but apparently seeks in its brief to avoid the impact of Section 10 (e) by labeling its contention "jurisdictional" (Br., p. 5). As we shall demonstrate, however, a showing that the employees involved in unfair labor practice cases are not agricultural workers has not been made a jurisdictional prerequisite either by Section 2 (3) of the Act or by the appropriation rider in effect during the proceedings in this case, which further limited the Board's processes with respect to agricultural workers. Accordingly, the Company cannot escape the interdiction of Section 10 (e) against making belated contentions. Cf. *United States* v. *Tucker Truck Lines,* 344 U. S. 33. And we shall further show that in any event, the Company's employees are not agricultural workers within the meaning of the exemption relied on by the Company.

I. The Company's contention that its employees are exempt from the Act's protection does not raise a jurisdictional issue, and therefore cannot be urged initially before this Court

A. A showing that employees involved in Board proceedings fall within the definition given in Section 2 (3) of the Act is not a jurisdictional requirement

The general term "employees," as it is used in the provisions of the Act which guarantee such employees

organizational rights (Section 7), protect them from unfair labor practices (Section 8 (a)), and establish procedures for their selection of a bargaining representative (Section 9), is defined in Section 2 (3). That Section, in applicable part, reads:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act * * *

The Company makes the unsupported claim that the several exemptions listed in this section are jurisdictional in character. This contention confuses the term jurisdiction, which applies to the fundamental adjudicatory "power to hear and determine the controversy" (In re *N. L. R. B.,* 304 U. S. 486, 494), with considerations which govern the merits of a case, that is, statutory provisions and common law principles by which tribunals determine whether a cause of action has been established. Contrary to the Company's assumption, it does not follow from the fact that the

Act imposes a duty upon the Board not to find unfair labor practices where the employees involved do not come within the definition of Section 2 (3), that this duty affects the Board's jurisdiction. For "jurisdiction is the power to decide the case either way * * *." *Erickson* v. *United States,* 264 U. S. 246, 249. And legislative directions to courts or administrative agencies, even where couched in mandatory language, do not necessarily go to the jurisdiction of the tribunal involved.[3] Accordingly, the test of a jurisdictional requirement is not whether a wrongful decision would be violative of a duty imposed on the tribunal by the legislature or a departure from legislative intent; rather the distinction between jurisdiction and substantive or procedural rights of a litigant is a question "of construction and common sense." *Fauntleroy* v. *Lum,* 210 U. S. 230, 235.

We think that common sense makes it apparent that the several exemptions contained in Section 2 (3) of the Act are not of the calibre that pertains to the Board's power, as distinct from its duty. An examination of the provisions of Section 2 (3) shows that in addition to the exemption pertaining to agricultural employees, the statute exempts any employee working for his parent or spouse, domestic servants, persons whose jobs were terminated because of labor disputes but who have not obtained equivalent employment, and supervisory employees. These considerations are not concerned with fundamental

[3] *Humphrey* v. *Smith*, 336 U. S. 695; *Smith* v. *Apple*, 264 U. S. 274; *Fauntleroy* v. *Lum*, 210 U. S. 230, 234–235; *N. L. R. B.* v. *Greensboro Coca Cola*, 180 F. 2d 840, 844–845 (C. A. 4).

adjudicatory power, but rather with whether a particular claimant qualifies to obtain the benefits of the Act. Were the Company's contention to the contrary to prevail, the Board in every unfair labor practice case would be obliged to show, in order to establish its jurisdiction,[4] that the employees involved are not related to the employer, that if their employment had been terminated because of a labor dispute they had not since obtained equivalent employment, that they are not in the domestic service of a family, that they are not independent contractors, and so on, just as the Board now is obliged to show that the employer's business affects interstate commerce (see R. 10–11, 83). Similarly, because of the liberality of the rules which permit advantage to be taken of a jurisdictional defect, issues concerning these same matters could be raised, as the Company now seeks to raise the issue of agricultural exemption, at any time during a case,[5] at the initial hearing or on appeal by either party or by the court *sua sponte*,[6] without the benefit of prior decision by the Board after litigation before it. These consequences emphasize what seems apparent on the face of the Section 2 (3) definitions—that they are non-jurisdictional. Otherwise, as Mr. Justice Holmes put it, "* * * common sense would revolt." *Fauntleroy* v. *Lum, supra,* p. 235.

[4] Cf. *Clark* v. *Paul Grey, Inc.*, 306 U. S. 583, 589–590; *N. L. R. B.* v. *Greensboro Coca Cola*, 180 F. 2d 840, 845 (C. A. 4).

[5] *City of Gainsville* v. *Brown-Crummer Co.*, 277 U. S. 54; *Central States Co-op.* v. *Watson Bros.*, 165 F. 2d 392 (C. A. 7).

[6] *Laughlin* v. *Cummings*, 105 F. 2d 71 (C. A. D. C.).

It follows from what we have said that the Boar had jurisdiction over the subject matter of this cas regardless of whether the Company's employees wer agricultural laborers within the meaning of Sectio 2 (3) of the Act. Accordingly, the agricultural ex emption question briefed by the Company is no before the Court, for the Company cannot escape "th salutary policy adopted by Section 10 (e) of affordin the Board opportunity to consider on the merits ques tions to be urged upon review of its order." *Ma shall Field & Co.* v. *N. L. R. B.,* 318 U. S. 253, 25 See also, *N. L. R. B.* v. *Seven-Up Bottling Co.,* de cided by Supreme Court on January 12, 1953, 3 LRRM 2237, 2239–2240; *N. L. R. B.* v. *Cheney Cal fornia Lumber Co.,* 327 U. S. 385, 388–389; *Unite States* v. *Tucker Truck Lines,* 344 U. S. 33.

B. The definition of agricultural employees contained in the appropriati bill rider in effect during the proceedings in this case does not limit t Board's jurisdiction

In addition to the Company's contention that th agricultural exemption in Section 2 (3) of the Ac restricts the Board's jurisdiction, and that it ma therefore initially raise the question before this Cour of that Section's application in this case, the Com pany also makes the same contention, and claims th same privilege for the belated question it raises, wit respect to the different limitation relating to agr cultural employees contained in a rider to the appro priation bill authorizing funds for the Board's opera tions during the period when the proceeding in thi case occurred. The language of the agricultural ride upon which the Company relies was first enacted i

the Board's appropriation bill for the fiscal year of 1946–1947, and has been reenacted in every subsequent appropriation bill to date. It reads (Public Law 759, 81st Cong. 68):

> *Provided,* that no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2 (3) of the Act of July 5, 1935 (49 Stat. 450), and as amended by the Labor-Management Relations Act, 1947, and as defined in section 3 (f) of the Act of June 25, 1938 (52 Stat. 1060).

During the years that this appropriation rider has been in effect there has been no modification of the language in Section 2 (3) of the Act which deals with the agricultural exemption, with the result that neither agricultural workers within Section 2 (3) or within "section 3 (f) of the Act of June 25, 1938" (the Fair Labor Standards Act) are entitled to the benefits of the Act. And as the Company concedes (Br., pp. 7, 11), there is a difference between the two exempting provisions. The exemption contained in Section 3 (f) of the Fair Labor Standards Act was intended to "broaden the agricultural exclusion" (Resp. Br., p. 7) over that contained in Section 2 (3) of the National Labor Relations Act.

But just as the Company cannot initially raise in this Court a question concerning the agricultural exemption in Section 2 (3), because that question is not jurisdictional in dimension, neither can it raise

a similar question under the exemption in the agricultural rider. For it has been conclusively determined by this and other courts that such an appropriation rider does not affect the Board's jurisdiction. *N. L. R. B.* v. *Thompson Products,* 141 F. 2d 794, 798–799 (C. A. 9). See also, *Camp & Co.* v. *N. L. R. B.,* 160 F. 2d 519, 521 (C. A. 6); *N. L. R. B.* v. *Elvine Knitting Mills,* 138 F. 2d 633, 634 (C. A. 2); *N. L. R. B.* v. *Baltimore Transit Co.,* 140 F. 2d 51, 58 (C. A. 4).

It is of particular importance in this case that appropriation riders, like that involved here, which do no more than restrict the manner in which an agency may disburse its funds, have been established by the settled authority as nonjurisdictional. For even if the Court should hold, contrary to our contention made on pp. 3-7, *supra,* that the definitions in Section 2 (3) are jurisdictional, it would not follow, in view of the nature of an appropriation rider as described in the foregoing cases, that the Company could raise the question of whether the broader exemption in the appropriation rider is also applicable in this case. And we believe that the separate question of whether the Section 2 (3) exemption applies to the employees in this case, assuming that it has been properly raised, has been conclusively settled against the Company by this Court in the three cases which it has had occasion to consider the language in Section 2 (3) dealing with agricultural workers. See *North Whittier Heights Citrus Association* v. *N. L. R. B.,* 109 F. 2d 76, certiorari denied

310 U. S. 632; *N. L. R. B.* v. *Tovrea Packing Co.*, 111 F. 2d 626, certiorari denied, 311 U S. 668; *Idaho Potato Growers* v. *N. L. R. B.*, 144 F. 2d 295, certiorari denied, 323 U. S. 769.[7] These cases, like the instant one, concerned employees engaged in activities related to the sorting and packing of agricultural commodities after they had been brought into a packing shed from the fields. As the Court observed in the *Potato Growers* case, "employees who are not working at farming, but who are specializing in the preparation of farm products for trade or shipment after they have been raked or gathered, are not agricultural laborers [within the meaning of Section 2 (3) of the Act]" 144 F. 2d at 301.

The Company's attempt to distinguish these cases is wholly unavailing. Thus, the *North Whittier Heights* case can scarcely be differentiated from this case because in that case, as the Company points out (Br. p. 13), "When [the commodity] reaches the packing house, it is then in the practical control of a great selling organization." For the Company's selling organization was also necessarily substantial, in order to dispose of what it refers to as its "$400,000 melon crop" (Br. p. 6). And the fact that the employees in the *Tovrea* case were employed in activities

[7] These cases were decided before the 1946 appropriation rider was enacted, and consequently are not concerned with the question of the applicability of Section 3 (f) of the Fair Labor Standards Act, which broadens the agricultural exemption. They treat only the narrower exemption contained in Section 2 (3) of the National Labor Relations Act, which, as the Company properly concedes (Br., p. 10), has not been changed by the 1947 amendments.

"adjacent to" and "incidental to" (Br. pp. 13, 14) the packing plant, far from distinguishing that case as the Company suggests, serves only to emphasize that had they been employed in the packing plant, as here, the inapplicability of the agricultural exemptions would be even clearer. Finally, the Company's assertion that the *Potato Growers* case differs from this one, because the employers involved packed potatoes grown by other persons, furnishes no distinction, for as the facts of that case make clear, several of the employers packed potatoes they grew themselves. See 144 F. 2d at p. 299.

Accordingly, while we strongly contend that Section 2 (3) of the Act is not jurisdictional, we think that irrespective of that contention, the Company is left without any argument that has not already been unambiguously resolved against it by the decisions of this Court. For this Court has held both (1) that packing shed employees like those involved here are not exempted from the Act's benefits by Section 2 (3), and (2) that an appropriation rider, like the one relied on by the Company, does not affect the Board's jurisdiction, with the consequence that the Company cannot raise the belated question of whether the employees in this case are covered by the agricultural exemption in the appropriation rider.

II. In any event, the Company's employees are not disqualified from enjoying the Act's benefits by the agricultural exemption contained in the rider to the Board's appropriation bill

We have shown that the question of the Company's employees' status as agricultural workers is not properly before the Court. We now show that even if

the Company were not precluded from advancing its contention, it is without merit and affords no defense to enforcement of the Board's order. In turning to this question, we deal only with the agricultural exemption contained in the rider to the Board's appropriation bill, and not with the different language of Section 2 (3) of the Act. For if the Company cannot bring its employees within the broader definition of agricultural laborers written into the appropriation rider, *a fortiori* it cannot bring them within the narrower definition in Section 2 (3) of the Act. Moreover, as we have shown, *supra,* pp. 9-11, the decisions of this Court conclusively establish that employees engaged in packing sheds, like the Company's, are not within the exemption of Section 2 (3) of the Act.

A. Administrative and judicial authority establishes that packing shed employees whose employment circumstances are like those of the Company's are not within the definition of agricultural laborers which is incorporated in the rider to the Board's appropriation bill

As we have stated elsewhere, the agricultural rider to the Board's appropriation bill disallows the expenditure of Board funds in connection with employees engaged in agriculture as that term is defined in Section 3 (f) of the Fair Labor Standards Act. Section 3 (f) in applicable part reads (29 U. S. C. 203 (f)):

> Agriculture includes farming in all its branches * * * and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market * * *.

To support its contention that its employees are engaged in activities covered by this definition, the Company asserts (Br. p. 19) that the "melon packing [involved in this case] is carried on as 'an incident to' . . . [and] 'in conjunction with' [its] farming operations" because the dictionary definition of those terms includes a "combination" or "concurren[ce]" of events, such as sorting and packing melons after they are brought in from the fields where they grew. To fortify its dictionary definition argument, the Company relies (Br. pp. 21–26) upon judicial decisions which deal with agricultural worker provisions of statutes other than the Fair Labor Standards Act. The error of the Company's approach has been thoroughly exposed by the Supreme Court where it has warned that in construing Section 3 (f) of the Fair Labor Standards Act, courts must "not 'make a fortress out of the dictionary,'" and must avoid a "perver[sion of] the process of interpretation by mechanically applying definitions in unintended contexts." *Farmers Reservoir & Irrigation Co.* v. *McComb,* 337 U. S. 755, 764; see also *N. L. R. B.* v. *Cowell-Portland Cement Co.,* 148 F. 2d 237, 241 (C. A. 9), certiorari denied 326 U. S. 735.[8] Indeed, in rejecting a mechanical application of out-of-con-

[8] The point of the Supreme Court's admonition is well-illustrated here, where the Company relies (Br. pp. 24–25) on cases arising under The Social Security Act. For, as we show, *infra,* pp. 23-27, Congress rejected the definitions of agricultural worker contained in that act as being inappropriate to the National Labor Relations Act for the express reason, *inter alia*, that it did not wish packing shed employees to be exempted from the benefits of the National Labor Relations Act.

text definitions, the Supreme Court in the *Farmers Reservoir* case fully described a more accurate index to the correct construction of the agricultural exemption in the Fair Labor Standards Act (337 U. S. at 761–762):

> The determination cannot be made in the abstract * * *. The fashioning of tools, the provision of fertilizer, the processing of the product, to mention only a few examples, are functions which, in some societies, are performed on the farm by farmers as part of their normal agricultural routine. Economic progress, however, is characterized by a progressive division of labor and separation of function * * *. In this way functions which are necessary to the total economic progress of supplying an agricultural product, become, in the process of economic development and specialization, separate and independent productive functions operated in conjunction with the agricultural function but no longer a part of it. Thus, the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity. The farmhand who cares for the farmer's mules or prepares his fertilizer is engaged in agriculture. But the maintenance man in a power plant and the packer in a fertilizer factory are not employed in agriculture, even if their activity is neces-

sary to farmers and replaces work previous done by farmers.

The approach which has thus been described by t Supreme Court is further delineated by the rule th "any exemption from such humanitarian and remedi legislation [as the Fair Labor Standards Act] mu * * * be narrowly construed * * *. To exte an exemption to other than those plainly and unmi takably within its terms and spirit is to abuse the inte pretative process and to frustrate the announced w of the people." *Phillips Co.* v. *Walling,* 324 U. S. 4 493; see also, *McComb* v. ***Hunt Foods,*** 167 F. 2d 9 908 (C. A. 9).

It is not enough, then, to bring employees with the agricultural exemption, to show—and respond goes no further—that they are engaged in any oper tions carried on by a farmer "until he has harveste prepared for market and sold the agricultural pro ucts which he has grown" (Br. p. 6).[9] For activiti of a farmer are not within the agricultural exemptio even though performed prior to sale of his produ and even though they are essential to the marketi of it, if they are so organized as to be "separa

[9] Respondent's reliance upon this Court's opinion in *McCo* v. *Hunt Foods*, 167 F. 2d 905, certiorari denied 335 U. S. 8 which alludes to "The policy of protection to the growers 'perishable and seasonal fresh fruits'" (Br. 27), is totally m placed. That case dealt not with the agricultural exemption und Section 3 (f), as ~~this~~ this case, but with an entirely differe section (7 (c)) which makes special exceptions to the wage a hour provisions of the Fair Labor Standards Act for growers perishable fruits. Obviously, entirely different considerations a applicable to the two sections.

and distinct from agriculture." *Calaf* v. *Gonzales,* 127 F. 2d 934, 938 (C. A. 1); *Waialua Agriculture Co.* v. *Maneja,* 97 F. Supp. 198, 222 (Hawaii). Accordingly, activities of a farmer which are industrial in character, and are organized as an independent unit from strictly farming work are not "an incident to or in conjunction with such farming activities" as required by Section 3 (f) of the Fair Labor Standards Act. The reason for this differentiation, has been explained by the Court of Appeals for the First Circuit (*Bowie* v. *Gonzales,* 117 F. 2d 11, 18):

> The [Fair Labor Standards] Act was drawn not to include [farm workers] because agriculture labor was not subject to the usual evils of sweat shop conditions of long hours indoors at low wages. Also any attempt to regulate agricultural wages would present a difficult problem since a substantial part of the agricultural workers' income must of necessity be for board and room. The employees in the instant case are typical factory workers or laborers engaged in maintaining industrial facilities. The exemption of agricultural labor from the operation of the Act is not admissible as an argument to exempt labor in an industry from its operation.

As this Court has summarized the distinctions between agricultural operations and industrial activities respecting agricultural commodities, "when the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing it has entered upon the status of industry." *North Whittier*

Heights Citrus Association v. *N. L. R. B.*, 109 F. 2
76, 80 (C. A. 9), certiorari denied, 305 U. S. 660.[10]

Utilizing the guides for construing Section 3 (f
thus established by the courts, the Administrator o
the Fair Labor Standards Act has issued several in
terpretative pronouncements which bear directly o
the question of whether packing shed employees, lik
those involved here, fall within the agricultural ex
emption of that section. We turn to the Admini
trator's interpretation as an authoritative source o
assistance, for "while not controlling upon the cour
* * * [they] constitute a body of experience an

[10] The Company's attempt to gloss over the distinction betwe
agricultural operations and industrial operations on agricultur
products is highlighted by its reliance on *N. L. R. B.* v. *Campbe*
159 F. 2d 184 (C. A. 5) (Br. pp. 11–12). For in that case th
Court of Appeals for the Fifth Circuit assumed that the trea
ment of agricultural and industrial operations by the Social S
curity Act was "applicable in cases arising under the Nation
Labor Relations Act" (159 F. 2d at 187), and therefore held th
employees were exempt under Section 2 (3) of the National Lab
Relations Act so long as they worked on agricultural commoditi
grown by their employer. But as this Court has recognized,
rejecting the contention that the agricultural exemption in th
Social Security Act is similar to that of Section 2 (3) of th
National Labor Relations Act, "the purpose of [the Social S
curity Act is] very different from the purposes of the so-calle
Wagner Act" and for that reason "we must make a sharp cleava
in the basis of our reasoning." *Idaho Potato Growers*
N. L. R. B., *supra*, at p. 301. Moreover, as we show *infr*
pp. 23-27, the exemption contained in the Board's appropriatio
bill which is applicable here was enacted with the express legisl
tive understanding that its meaning was markedly different fro
that contained in the Social Security Act. Accordingly, th
Campbell case is of no help to the Company either with respe
to Section 2 (3) of the Act or the agricultural rider in the Board
appropriation bill.

informed judgment to which courts and litigants may properly resort for guidance."[11] The "guidance" to be had from the Administrator's ruling is of special importance in this case, for the Company apparently concedes (Br. p. 20) that under them its claim of agricultural exemption is defeated.

Indeed, the Company could scarcely argue otherwise. In his *Interpretative Bulletin No. 14* (Wage and Hour Manual, 1944–1945, p. 560 at 563), the Administrator makes clear that in his opinion a farmer's activities come within the exemption only if they "constitute a subordinate and established part of the farming operation," which is determined by such factors as whether "most of the employees engaged in such practices are normally employed also in farming operations upon the farm, and [whether] these practices occupy only a minor portion of the time of the farmer and such employees and do not constitute the farmer's principal business." Applications of these views to packing shed employees were described in three published letters from the Administrator's office answering two inquiries from the National Labor Relations Board and one from Senator Hayden. Thus, in one of the letters (Vol. 25, Wages and Hours Labor Relations Reporter No. 3, p. 4 (Nov. 14, 1949)), "a fresh fruit packing house" operated by a farmer was determined not to be within the Section 3 (f) exemption because its operations were "characteristic of a nonfarming enterprise," were "not performed on the

[11] See also, e. g., *United States* v. *American Trucking Assn.*, 310 U. S. 534, 549; *Anderson* v. *Manhattan Lighterage Corp.*, 148 F. 2d 971, 973 (C. A. 2); *Miller Hatcheries* v. *Boyer*, 131 F. 2d 283, 286 (C. A. 8).

Kidmore v. Swift & Co., 323 U.S. 134, 140.

farm but in a town approximately four miles distant' and had the "character of a separate business." In another of the letters, the Administrator ruled that "the operations, by the owner of a farm or farms, of a large packing or processing plant of a type operated by nonfarmers and having predominantly industrial characteristics has not, as a rule, been considered a practice 'incident to or in conjunction with' the owners' farming operations" (*ibid.*, p. 9). As summarized by the Administrator (*ibid*, p. 7):

> * * * it is * * * clear from the legislative history of the Fair Labor Standards Act and the reason for the agricultural exemption based upon the definition of agriculture that it was not intended that activities which had assumed an industrial character should be included within the definition merely because the produce being processed came only from the farm of the employer. * * * The determination must ultimately rest upon whether the complete factual picture indicates that the practice is merely a subordinate and established part of the farming operations. * * * Factors to be considered include, among others, the size of the ordinary farming operations, the investment in the enterprise as compared to that in the farm operations, the amount of time spent by the farmer and his employees in each of the activities, the extent to which the operations in question are performed by ordinary farm employees, the degree of industrialization involved, the degree of separation established by the employer between the two types of business operations, and the type of product resulting from the operation of the enterprise.

An examination of the comparative methods by which the Company has organized and operates its farm where the melons are grown and its packing shed where they are sorted and crated for market makes clear, in the light of the principles we have discussed, that its packing shed operations do not fall within the agricultural exemption of Section 3 (f) of the Fair Labor Standards Act. The packing shed, which is located from six to nine miles away from the farm (R. 73), is conducted as a completely separate and independent enterprise from the farm. The majority of the farm work with respect to melons is apparently done by workmen hired by an independent contractor who have nothing to do with the packing shed (R. 76–77, 79, 110). Similarly, the packing shed is run under the supervision of a foreman who has the sole authority to hire and fire its employees, but substantially no authority with respect to the farm's operations (R. 79–81). There is no appreciable interchange of workmen between the farm and the packing shed; indeed, there scarcely could be in view of the fact that the three- or four-month period when the packing shed is in operation is also the busiest season on the farm (R. 76, 110). The farm employees are paid hourly, unlike the packing-shed employees who are paid at a piece rate, and also unlike the latter, the farmers are furnished living quarters, gas, electricity and water (Tr. 70, 72).[12]

[12] The testimony relevant to these facts is as follows:

P. 70—

Q. (by Mr. Magor, for the Board). How are the packing shed employees paid?

Apart from their common ownership, the organization and operation of the packing shed is wholly "separate and distinct" from the farm, thus failing to come within the reach of agriculture as defined in Section 3 (f). *Calaf* v. *Gonzales,* 127 F. 2d 934, 938 (C. A. 1); *Waialua Agriculture Co.* v. *Maneja,* 97 F. Supp. 198, 223 (Hawaii).

Of equal significance with the independent status of the packing shed, in determining whether the Company's employees are agricultural workers within the exemption in Section 3 (f), is the industrial character of its organization. The shed is a building of 60′ x 200′, worth about $25,000, and is located in the City of Mendota on a railway spur which respondent had built for its use at a cost of approximately $3,000 (R. 75, 84). Its operations are completely powered by electricity, the electrical equipment consisting of "conveyors, belting, rollers, bidding machines, crate racks, bins [and] elevators" (R. 84). The melons are brought to the shed from the farm by trucks and trailers rented by respondent from an independent trucking firm (R. 81–82). Upon arrival at the shed

---

A. (Mr. Warkentine, for the Company). They are paid per pieces.

Q. What is the rate of pay?

A. The rate of pay—well, that is figured on the packer's output.

P. 72—

Q. As to the ranch employees, how much do they pay people in this work on the ranches?

A. They are paid by the hour.

Q. Paid by the hour. What is their rate of pay?

A. Their rate of pay is 75 cents an hour, which consists of naturally, their living quarters, gas, electricity, gas and water furnished.

the melons are rolled "onto a conveyor belt which conveys them into the shed to the sorters; from the sorters it goes to the packers, and from the packers to the bidding machine and down the conveyor there, and the bidders and truckers pick it up and load." (R. 82). The Company contracts with a local ice company to service refrigerator railway cars, where the melons are loaded, at a cost of approximately $10,000 a year (see Company Br., p. 2). During the peak of the packing season about 60 employees work at the shed (R. 21). The terms and conditions of employment for these employees are established in a collective bargaining agreement, which of course in no way affects respondent's farm employees (R. 111). At the end of the season all of the packing shed employees are laid off and the shed is closed down (Tr. 69).[13]

In these circumstances we think it plain that the packing shed employees "are typical factory workers or laborers engaged in maintaining industrial facilities." *Bowie* v. *Gonzalez,* 117 F. 2d 11, 18. (C. A. 1.) They have no association with the farm work as such, and are treated by the Company as industrial workers (see, Collective Bargaining Contract, Board Ex. #3, R. 111). In short, an application here of the criteria by which nonagricultural workers are

[13] The supporting testimony for this statement is as follows: P. 69—

Q. (by Mr. Magor for the Board). Now when the packing shed closes down to all of those employees? They cease working?

A. (by Mr. Warkentine for the Company). That is true.

Q. The people working on the packing shed?

A. Yes.

measured (pp. 18-19, *supra*), *viz,* the Company's substantial investment in the packing shed, the lack of interchange of employees between farm and packing shed, the full time and industrial character of the work at the packing shed, and the complete organizational and geographical separation between the farm and packing shed, shows unmistakably that the packing shed is not a farming operation so as to exempt its employees under Section 3 (f) of the Fair Labor Standards Act.

B. In its consideration of the agricultural rider to the Board's appropriation bill Congress expressed an unambiguous intent not to exempt packing shed employees from the protection of the Act

The correctness of construing Section 3 (f) of the Fair Labor Standards Act, as incorporated into the agricultural rider which the Company invokes in this case, not to exempt the Company's packing shed employees is conclusively confirmed by the legislative debates on the appropriation rider. This legislative history shows that the language of the rider as it first appeared in 1946 in the proposed appropriation bill for the Board was designed to exempt packing shed employees, like those of the Company, ~~or~~ and agricultural laborers. However, this language was deleted, and the present language was substituted, for the express reason that Congress did not wish to deprive such packing shed employees of the Act's benefits. It was only upon the explicit assurance by the managers of the appropriation bill that packing shed employees would not be within the agricultural exemption that the Senate enacted the rider

We describe this persuasive legislative history in more detail below.

As the Board's appropriation bill for the fiscal year 1946–1947 was initially introduced into the House, it contained no limitation with respect to agricultural workers.[14] However, during the House consideration of the bill Representative Elliott proposed an amendment subsequently adopted by the House (92 Cong. Rec. 6692), which reads as follows (92 Cong. Rec. 6689):

> *Provided further,* that no part of the funds appropriated in this title shall be used in connection with the investigation, hearings, directives, or orders concerning bargaining units composed in whole or in part of agricultural laborers as that term is defined in the Social Security Act in section 409, title 42, United States Code.

The definition in the Social Security Act thus referred to would have extended the agricultural exemption to "* * * all services performed * * * (4) In handling * * * packing, packaging, [or] processing * * * any agricultural or horticultural commodity * * * if such service is performed * * * in the case of fruits and vegetables, as an incident to the preparation of such fruits and vegetables for market."[15] As Representative Elliott conceded (92 Cong. Rec. 6691, 9147), and as was assumed throughout the debate in the House (92 Cong. Rec. 6689, 6690, 6691, 8664), the Elliott proposal would

[14] H. R. 6739, 79th Cong., 2d sess., pp. 44–46 (1946).

[15] 42 U. S. C. 409 (h), 410 (f); see also 92 Cong. Rec. 6689.

have exempted from the Act's protection, as agricultural workers, those who were employed in packing sheds like the one involved in this case.

When the House bill was submitted to the Senate, and there referred to the Senate Appropriations Committee, Chairman Herzog of the National Labor Relations Board, protested the adoption of the Elliott agricultural rider in his testimony during the Senate Committee hearings. According to Chairman Herzog the Elliott rider would exempt "packing shed and processing employees * * * mostly in the western part of the United States, and some in the South, who are really industrial workers."[16] The Senate Appropriations Committee apparently agreed, and in its report to the Senate recommended that the Elliott rider be deleted from the bill.[17] Although the Senate adopted the recommended deletion (92 Cong. Rec. 7945), the House refused to accept the Senate action, and conferees from the two bodies were unable to reach an agreement. 92 Cong. Rec. 8657, 8658, 8662–8668.

At this juncture Senator McCarran, chairman of the Senate Appropriations Committee, proposed on the floor of the Senate that the Senate recede from its position, and agree to the Elliott rider which exempted "employees who work in packing houses, that is crating houses and sheds where agricultural commodities are first packed for shipment" (92 Cong. Rec. 8735). The Senate was adamant, however, and

[16] Hearings before the Subcommittee of the Committee on Appropriations, United States Senate on H. R. 6739 (1946), p. 101.

[17] Sen. Rep. 1619, 79th Cong., 2d sess., p. 12 (1946).

voted to reject the Elliott rider by a count of 53–23. 92 Cong. Rec. 8746. The reasons advanced by the Senators opposing the Elliott rider were in large measure those which this Court in the *North Whittier Heights* case[18] and the Administrator of the Fair Labor Standards Act have expressed in refusing to classify packing shed employees as agricultural workers. See pp. 16-19, *supra,* and 92 Cong. Rec. 8735–8746.

Finally, the impasse between the House and the Senate was broken by the substitution by the conferees of the present language, incorporating the definition of agricultural laborer found in Section 3 (f) of the Fair Labor Standards Act for the Elliott rider which referred to the definition in the Social Security Act. The conference agreement was passed without debate in the House (92 Cong. Rec. 9494), but was accepted by the Senate (92 Cong. Rec. 9642) only after assurance had been given by Senator McCarran, as chairman of the Appropriations Committee and one of the conferees, that Section 3 (f) would not exempt employees of "a packing shed * * * operated away from the farm and carried on not as a farming operation, but as an independent enterprise." 92 Cong. Rec. 9642. As further explained by Senator Ball, another of the conferees (92 Cong. Rec. 9642):

> Instead of using the definition of "agricultural worker" contained in the Social Security Act [sic] the definition is a very broad one, covering, as the Senator knows, a great many processing employees, packing shed workers,

[18] 109 F. 2d 76 at 79–81, cited in 92 Cong. Rec. 8737 and 8742.

> and so forth—this change substitutes the definition of "agriculture" contained in the Fair Labor Standards Act, which is a much narrower definition.

And, significantly, both Senators McCarran and Ball informed the Senate that the substitution had been discussed with representatives of the National Labor Relations Board, who were satisfied that Chairman Herzog's objections to the Elliott rider (p. 25, *supra*) were no longer applicable (92 Cong. Rec. 9641–9642).

From the foregoing it seems clear that the Company is asking this Court to adopt a construction of the agricultural exemption in the Board's appropriation bill which Congress expressly considered and rejected. We think it would be difficult to find a more striking example of a manifestation of legislative intent with respect to a particular factual situation than that involved here, where Congress refused to enact a proposed definition of agricultural laborers until it was assured that packing shed employees, like the Company's, were not encompassed by the definition. And, we submit, this expression of intent is wholly consistent with the language Congress adopted, which, as we have shown, cannot properly be stretched to include within its exempting provisions employees like those involved here.

CONCLUSION

For the foregoing reasons we respectfully submit that the Company's contention that its employees are agricultural workers and therefore exempted from

the Act's protection should be rejected, and that the Board's order should be enforced in full.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
ARNOLD ORDMAN,
DUANE BEESON,
FRANKLIN C. MILLIKEN,
Attorneys,
National Labor Relations Board.

JANUARY 1953.

U. S GOVERNMENT PRINTING OFFICE: 1953

No. 13,444

IN THE

United States Court of Appeal

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PAPPAS AND COMPANY and FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78, and FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA,

Respondents.

PETITION FOR REHEARING

MOSS, LYON & DUNN,
GEORGE CLARK LYON,
210 West Seventh Street,
Los Angeles 14, California,
Attorneys for Pappas and Company

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

No. 13,444

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PAPPAS AND COMPANY and FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78, and FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA,

Respondents.

PETITION FOR REHEARING

To the Honorable Mathews, Stephens, and Orr, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Respondent, Pappas and Company, respectfully petitions this Court for rehearing following decision rendered herein April 22, 1953.

We must respectfully point out that there has been, in our opinion, a misreading of the evidence in this case, which affects the cornerstone of the opinion.

The Court states that the *Cheney* case *(N. L. R. B. v. Cheney Lumber Co.* (1946), 327 U. S. 385, 388) is not applicable to this case because:

> "in reading the evidence in our case, relative to the status of the shed employees, we find evidence that they were furnished by a Contractor." (Op. p. 5.)

We respectfully submit that a rehearing of the transcript will show no such evidence. The evidence shows that the field picking labor for Pappas and Company was employed by a contractor. The packing shed laborers, however,—the employees involved in this proceeding—were employees of Pappas and Company, and were not furnished by a contractor.

The transcript of the evidence as to contract labor, [Tr. pp. 76-78] reads as follows:

> "Q. You say a certain amount of labor is furnished by a contractor? A. That is right.
>
> Q. When does this contractor furnish labor? Is that during the peak season? A. That is during the peak season, the contractor furnishes some employees, is that correct? A. That is right.
>
> Q. And that is when you are growing melons? And what work is done by the contractor? A. Well, the contractor, he does the hoeing, thinning, and cutting weeds and maybe help in irrigation or something like that, a few of the men—
>
> Q. He does the hoeing and thinning, is that it? Who does the picking of the melons? A. He does the picking of the melons, too.
>
> Q. The picking of the melons is done by the employees? A. That is right.

Q. Is that a verbal or written contract? A. That is a verbal contract.

Q. You speak of 75 employees about that time—did you say about 75? A. That is right.

Q. Does that include the 25 you say work there the year around? A. No. In most cases that would be in addition.

Q. That would be in addition to the 75, is that correct? A. Yes.

Q. Then the 70 or 75 employees are employed by the contractor, or are they employed by Pappas and Company? A. They are employed by the contractor.

Q. How is the contractor paid for his work? A. The contractor himself is paid by the day, whereas his help is paid by the hour.

Q. Do you make any payment to his help, or Pappas and Company? A. No.

Q. In other words, you pay the contractor, and the contractor in turn pays his employees, is that correct? A. That is true.

Q. *And they do the actual picking of the melons in field, is that correct?* A. *That is correct.*

* * * * * * * *

Q. Do you keep payroll records of each man who is employed by the contractor? A. No, we don't

Q. What do you mean by checking up? A. Well, just how many men he furnishes for a day

Q. Who does the hiring and firing of those men? A. The contractor does, with the men.

Q. The contractor himself does, is that correct? A. Yes."

The only work done by the contractor and his employees, as shown by the transcript is work in the fields—hoeing, thinning, irrigating and picking. The evidence shows that the trucking employees, hauling the melons from the fields to the sheds, and the packing shed employees, engaged in sorting and packing the melons at the shed, are employees of Pappas and Company [Tr. pp. 79-81].

More specifically, the evidence shows in regard to packing shed employees:

(a) T. H. Hamilton, the shed foreman, is himself an employee of Pappas and Company [Tr. p. 112].

(b) As shed foreman (and as an employee of Pappas and Company), he hires and fires the shed employees [Tr. p. 112] as contradistinguished from the contractor's employees who are hired and fired by the contractor.

(c) The packing shed employees are paid by Pappas and Company [Tr. p. 91] as contradistinguished from the employees of the contractor, who are paid by the contractor.

(d) The particular shed employee involved in these proceedings, Virgil Ramey, was, by his own testimony, an employee of Pappas and Company, employed by Hamilton, and paid by Pappas and Company check at the time of the alleged unfair labor practice [Tr. pp. 84, 85, 91, 95 and 98].

This Court, in its opinion, states:

> "Whether the language of the *Cheney* case has the affect of modifying the *Marshall Field* case, so that we could refuse to enforce the Board's order if upon a review of the evidence we found no evidence to support the implied finding that the employees were non-agricultural . . . we need not decide."

This statement is premised upon the next sentence of the Court's opinion, that the implied finding that the shed employees were non-agricultural, is, in fact, supported by evidence, namely, that the shed employees were furnished by a contractor, rather than being employees of the farmer, and therefore were non-agricultural. But, if the evidence does not show that the shed employees were furnished by a contractor, then there is no evidentiary support for the implied finding and the *Cheney* case is controlling.

Under these circumstances, we petition the Court to grant a rehearing and, in the light of the *Cheney* case, to determine that there is no evidence to support the implied finding of the Board concerning the non-agricultural status of the employees here involved, and we further petition that this Court refuse to enforce the order of the Board, or, in the alternative, that it remand the case to the Board for further evidence on the implied finding.

Respectfully submitted,

Moss, Lyon & Dunn,

George Clark Lyon,

Attorneys for Pappas and Company.

Certificate of Counsel.

I, George Clark Lyon, of counsel for Respondent Pappas and Company in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

GEORGE CLARK LYON,

Attorney for Respondent.